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No. 2008 – 3126, 3127

In The
Supreme Court of the United States

DOM WADHWA, M.D., *pro se*
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

JEFFREY A. GAUGER, Esquire,
Attorney for the Respondent
B. CHAD BUNGARD, Esquire,
Attorney for the Respondent
CALVIN M. MORROW, Esquire,
Attorney for the Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has rendered an opinion regarding jurisdiction that is in conflict with its prior opinion in the case of *Wadhwa vs. Merit Systems Protection Board, Fed. Cir. No. 2008 – 3176, -3177*.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported in Appendix (9 to 14). The Initial Decisions and Final Orders of the Merit Systems Protection Board ("Board") are reported in Appendix (15 to 40). A timely appeal for a petition for review was denied by the Board on January 29, 2008. A timely appeal to the United States Court of Appeals for the Federal Circuit was filed on February 26, 2008.

JURISDICTION

The Court of Appeals for the Federal Circuit filed its decision on October 7, 2008 on petitioner's lack of jurisdiction for his appeal to the Board and thereafter entered its order denying petitioner's motion for rehearing on October 31, 2008. This court has jurisdiction under 28 U.S.C. § 1254 (1) to review the U.S. Court of Appeals for the Federal Circuit's decision by writ of certiorari.

BASIS FOR INVOKING JURISDICTION

The basis for invoking the jurisdiction of the U.S. Supreme Court is that the U.S. Court of Appeals for the Federal Circuit has rendered an opinion in my case that conflicts with its prior opinions and the opinion involves fundamental issues of broad public importance requiring determination by the U.S. Supreme Court.

STATEMENT OF THE CASE

Issue One: Involuntary transfer (Directed Reassignment) of Petitioner from the VA Northern Indiana Health Care System (NIHCS) to the Philadelphia VA Medical Center (PVAMC).

Issue Two: Ten Member Panel at PVAMC removed Petitioner from clinical position at PVAMC as a "staff adjustment" in violation of Title 38 employees Reduction In Force (RIF) procedures.

Issue Three: Petitioner's demotion to a nonclinical position at PVAMC and reduction in pay at PVAMC as part of a "staff adjustment" violate the Code of Federal Regulations.

Issue Four: Petitioner's reduction in pay at PVAMC violates the Preservation of Pay regulation in the VHA Handbook.

BRIEF DISCUSSION OF EACH ISSUE

Issue One: Involuntary transfer (Directed Reassignment) of Petitioner from the VA Northern Indiana Health Care System (NIHCS) to the Philadelphia VA Medical Center (PVAMC).

This case arises out of my involuntary transfer on October 15, 2006, from my clinical physician position at the Philadelphia VA Medical Center ("PVAMC") to a clinical physician position at the Northern Indiana Health Care System ("NIHCS").

After **three workdays** at NIHCS I was placed on administrative leave pending investigation regarding my professional conduct and professional competency, because of untruthful and unsubstantiated information provided by my supervisors at PVAMC to NIHCS.

On January 21, 2007, I was involuntarily **reassigned** back to PVAMC (Directed Reassignment) by **William F. Feeley, VA Deputy Undersecretary for Health for Operations and Management**, to face charges of removal from my employment of over twenty years, **based on this untruthful and unsubstantiated information**.

Issue Two: Ten Member Panel at PVAMC removed Petitioner from clinical position at PVAMC as a "staff adjustment" in violation of Title 38 employees Reduction In Force (RIF) procedures.

In January 2007, a ten member panel composed of Agency Officials at PVAMC removed me from my clinical position and demoted me to a nonclinical position with a drop in annual pay, as a "staff adjustment," based on untruthful and unsubstantiated information provided by my supervisors at PVAMC to this ten member panel.

The Agency failed to follow Title 38 rules when it conducted the "staff adjustment" and separated me from my full-time clinical physician position in Primary Care. Title 38 employees are entitled to **RIF procedures** and the agency has **failed to afford me** those procedures when separating me from my full-time permanent physician position in Primary Care, pursuant to its "staff adjustment."

A permanent tenure would be consistent with DVA's appointing authority under 38 U.S.C. § 7401 (1) and thus, confer RIF appeal rights. *Nguyen*, 92 *M.S.P.R.* 326.

Issue Three: Petitioner's demotion to a nonclinical position at PVAMC and reduction in pay at PVAMC as part of a "staff adjustment" violate the Code of Federal Regulations.

In September 2007, my permanent placement into a nonclinical position with a drop in annual pay by $2,057 and denial of $5000 performance pay by the Agency were the direct result of my demotion as part of this "staff adjustment." Thus, RIF regulations from *James v. von Zemensky, 284 F. 3d 1310, 1314-15 (Fed. Cir. 2002)* apply in my situation.

Also, OPM recently passed new regulations regarding the rate of basic pay, which may sometimes include locality pay. See 5 C.F.R. § 531.203. These new regulations regarding rates of pay due to a demotion or **reduction in pay are appealable under the RIF regulations** at *Part 351 of Title 5 of the Code of Federal Regulations.*

Issue Four: Petitioner's reduction in pay at PVAMC violates the Preservation of Pay regulation in the VHA Handbook.

My drop in salary by the Agency was a violation of the regulations in *VHA Handbook 5007/21 page IX -19, Preservation of Pay,* which states "The amount of annual pay (base plus market) paid to a physician as a result of the January 8, 2006, conversion may not be less than the amount of pay (base plus special pay and GAP, if applicable) paid to the individual on the day before the conversion (plus any increases to base pay or mandatory adjustments to special pay effective on January 8, 2006) for as long as an individual remains in the same assignment."

The **Opinion and Order**, from October 7, 2008, from the United States Court of Appeals for the Federal Circuit **does not address the Preservation of Pay regulation** in VHA Handbook 5007/21 page IX -19.

REASONS FOR GRANTING THE PETITION

The Opinion and Judgment for Appeal Case No. 2008 – 3176, -3177 in the United States Court of Appeals for the Federal Circuit on October 7, 2008 did not take into consideration the four issues discussed in this appeal when it made its ruling that the Board did not err in dismissing my appeal for lack of jurisdiction.

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

sd/
Dom Wadhwa, M.D., *pro se*
Petitioner

Dated: November 26, 2008

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRUIT
717 MADISON PLACE, NW.
WASHINGTON, DC 20439

DOM WADHWA, M.D.
Appellant (*pro se*)

v.

Department of Veterans Affairs,
Defendant

APPELLANT'S MOTION TO CONSOLIDATE

The Appellant hereby requests The United States Court of Appeals for the Federal Circuit to consolidate the two MSPB Cases with Docket Numbers PH-0752-07-0301-I-1, Filed on March 23, 2007 and PH-3443-07-0638-I-1, Filed on September 20, 2007, because there is an overlap of these two MSPB cases.

Case No. 1
MSPB Docket No. PH-0752-07-0313-I-1

I made two appeals to the MSPB, on March 23, 2007 and on April 5, 2007, that were consolidated under the same docket number PH-0752-07-0313-I-1, as follows:

1. On March 23, 2007, I submitted my first appeal to the MSPB regarding my *reduction in pay* by Dr. John Murphy, Director of Primary Care, and by Dr. Michael Grippi, Chief of Medicine at the Philadelphia VA Medical Center (PVAMC).

2. On April 5, 2007, I submitted my second appeal to the MSPB regarding my *involuntary temporary nonclinical assignment* to the Compensation & Pension (C&P) section, a Prohibited Personnel Practice, by Dr. Murphy and by Dr. Grippi.

3. On April 26, 2007, Administrative Judge (AJ) issued an order to *close* the case after a discussion with her by the Agency's attorney at PVAMC, regarding the jurisdictional issue for my appeal to the MSPB.

4. On April 27, 2007, I was denied the opportunity by the Agency's attorney to participate in a telephonic status conference with the AJ, during which the issue of jurisdiction was discussed.

5. On June 22, 2007, the AJ reopened the jurisdictional record and ordered my attorney, on my behalf, to file a brief within 14 days of this order. The Agency contends that its attorney did not receive a copy of a brief regarding the jurisdiction issue from my attorney. Thus, on July 24, 2007, the Agency's

attorney filed a motion to dismiss my appeal to the MSPB, based on her claim that she did not receive this brief from my attorney.

6. The Initial Decision Order from the AJ was issued on July 24, 2007. This is the same day that the Agency's attorney filed the Agency's motion to dismiss my appeal.

7. On July 12, 2007, Dr. John Murphy, my first level supervisor, handed me the "Performance Pay Recommendation & Approval" form (VA Form 10-0432). This VA Form 10-0432 was for the period of July 1, 2006 to September 30, 2006, which was when I was performing my clinical duties as an attending physician in Primary Care. This form was signed by Dr. Michael Grippi, my second level supervisor, and dated by him as November 17, 2006. This same VA Form 10-0432 was not signed and dated by Dr. Murphy in the designated area on this form. This VA Form was not presented to me at or around the time the decision was made to not grant me $5000 of performance pay by Dr. Murphy and by Dr. Grippi. Also, there was no substantiating documentation given to me by Dr. Murphy or by Dr. Grippi to support their decision to grant no performance pay to me.

8. On July 19, 2007, I learned that Dr. Murphy and Dr. Grippi had prepared a high

satisfactory Interim Proficiency Report for me in my *involuntary temporary nonclinical* assignment in the Compensation & Pension (C&P) section. Dr. Murphy and Dr. Grippi intended to use this high satisfactory Interim Proficiency Report to permanently prevent my return to my over twenty-one year tenured position in Primary Care, and they intended to use this Interim Proficiency Report to permanently deprive me of my ability to maintain my over twenty-one year clinical privileges in the field of Primary Care Medicine within the Department of Veterans Affairs.

The consequence of this aforementioned action by Dr. Murphy and by Dr. Grippi is that I will be permanently deprived from practicing clinical medicine for the rest of my professional career within the Department of Veterans Affairs. I must practice in a clinical assignment in order to maintain my clinical privileges in Primary Care Medicine within the VA.

Case No. 2
MSPB Docket No. PH-3443-07-0638-I-1

I made an appeal to the MSPB, on September 20, 2007, under the docket number PH-3443-07-0638-I-1, as follows:

a. I received a drop in my annual income in January 2007. I was not offered an explanation for this drop in salary by my immediate supervisors, John Murphy, M.D., Director of Primary Care, and Michael Grippi, M.D., Chief of Medicine (i.e., a demotion).

b. Effective September 12, 2007, I am *permanently* assigned to the Compensation & Pension (C&P) section by agency officials, Dr. Murphy and Dr. Grippi (i.e., a permanent separation from my clinical position as an attending physician in Primary Care). The C&P position is a nonclinical job in which I perform *clerical duties* by completing C&P forms for otherwise well veterans, who are seeking compensation for service-related injuries and illnesses.

c. At the time of my assignment to the C&P section in January 2007, Dr. Murphy and Dr. Grippi stated to me that there was a *critical need* in the C&P section at PVAMC. The agency identified this staffing need in the C&P section to meet the Medical Center Director's performance measure of timeliness for completion of C&P examinations. Thus, the agency was realigning its resources to more appropriately support the mission, vision, goals, and objectives (i.e., a staff adjustment).

d. This separation from my clinical position and assignment to a nonclincal position by Dr. Murphy and by Dr. Grippi was initially a staffing adjustment based on the critical need of the medical center. My permanent assignment to the C&P section by these agency officials was a permanent separation from my clinical duties and a permanent assignment to clerical duties.

Analysis

In James v. Von Zemenszky, 284 F.3d 1310, 1319-21 (Fed. Cir. 2002), the court held that the Department of Veterans Affairs (DVA) must use Title 5 RIF procedures when conducting a "staff adjustment" involving medical professionals appointed under 38 U.S.C. § 7401(1). In Isabella v. Department of State, 102 M.S.P.R. 259, (2006), the Board stated that the Von Zemenszky court found that "title 5 reduction-in-force provisions applied to Veterans Health Administration (VHA) health-care professionals."

Thus, in my situation, Dr. Murphy's and Dr. Grippi's offer to me of an assignment to a temporary position that was later converted to a permanent position in the C&P section as a "staff adjustment" in lieu of a RIF separation from a full-time position in Primary Care, would be an appealable RIF action.

In determining whether I have made a nonfrivolous allegation of jurisdiction entitling me to a hearing, an administrative judge may consider an agency's documentary submissions. See Dumas, 789 F. 2d at 894; Manning, 742 F. 2d at 1428; see also Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed. Cir. 1986) (Newman, J., additional views). But, to the extent that the agency's evidence constitutes mere factual contradiction of my otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. See Dumas, 789 F.2d at 893-94; see also Ferdon v. U.S. Postal Service, 60 M.S.P.R. 325, 329 (1994).

Here, the AJ did **not** consider the evidence I submitted and decided based on the evidence submitted by the agency.

Conclusion

I assert that I was *erroneously* denied a hearing for the two MSPB cases by the Board.

I was simply separated from my over twenty-one (21) year tenured full-time position by only an e-mail notice of separation on September 12, 2007 from Dr. Murphy, my immediate supervisor.

I was then demoted to a permanent nonclinical position in the C&P section via this same e-mail. This sequence of notice of separation of me from Primary Care and my demotion to the C&P section, both via e-mail, avoids the employment contract, avoids RIF procedures and safeguards, and avoids appeal rights.

Dr. Murphy, and Dr. Grippi have conducted a reduction-in-force, and, as agency officials, did not follow the requisite RIF procedures. See 5 U.S.C. §§3501-3504; 5 C.F.R. Part 351 (agencies must follow the Office of Personnel Management regulations when conducting reductions in force).

The agency's failure to apply the RIF regulations to the restructuring that led to the elimination of my position in Primary Care was an impermissible circumvention of the RIF regulations and a violation of my substantive and procedural rights.

Sincerely,

Dom Wadhwa, M.D., *Appellant (pro se)*

Dated: February 26, 2008

Home Address of Appellant
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Moorestown, NJ 08057, Telephone: (856) 235-7530

United States Court of Appeals for the Federal Circuit

2008-3176, -3177

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for review of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

Dom Wadhwa, of Moorestown, New Jersey, pro se.

Jeffrey A. Gauger, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were B. Chad Bungard, General Counsel, and Calvin M. Morrow, Acting Assistant General Counsel.

Appealed from:
Merit Systems Protection Board
DECIDED: October 7, 2008

Before RADER, SCHALL, and PROST, Circuit Judges.

PER CURIAM.

DECISION

Dom Wadhwa ("Dr. Wadhwa") petitions for review of two final decisions of the Merit Systems Protection Board ("Board"). Each of the decisions dismissed for lack of jurisdiction an appeal by Dr. Wadhwa to the Board.

Wadhwa v. Dep't of Veterans Affairs, No. PH-0752-07-0313-I-1 (M.S.P.B. Jan. 29, 2008) ("Final Decision I"); Wadhwa v. Dep't of Veterans Affairs, No. PH-3443-07-0638-I-1 (M.S.P.B. Jan. 29, 2008) ("Final Decision II"). The two petitions have been consolidated into a single appeal. We **affirm**.

DISCUSSION

Dr. Wadhwa is employed as a physician with the Department of Veterans Affairs ("DVA"). This case arises out of his transfer on October 15, 2006, from his physician position at the Philadelphia VA Medical Center ("PVAMC") to a physician position at the Northern Indiana Healthcare System ("NIHCS"). Dr. Wadhwa was reassigned back to PVAMC on January 21, 2007.

Following his reassignment from NIHCS, Dr. Wadhwa filed two appeals with the Board. In his first appeal, he claimed that his reassignment resulted in a reduction in his

pay or grade. In his second appeal, he claimed that his reassignment constituted a removal. On July 24, 2007, the administrative judge ("AJ") assigned to the appeals issued an initial decision dismissing the reduction-in-pay claim for lack of jurisdiction. Wadhwa v. Dep't of Veterans Affairs, No. PH-0752-07-0313-I-1 (July 24, 2007) ("Initial Decision I"). Subsequently, on October 31, 2007, the AJ issued an initial decision dismissing the removal claim, also for lack of jurisdiction. Wadhwa v. Dep't of Veterans Affairs, No. PH-3443-07-0638-I-1 (Oct. 31, 2007) ("Initial Decision II").

Initial Decision I and Initial Decision II became final decisions of the Board on January 29, 2008, when the Board denied Dr. Wadhwa's petitions for review in Final Decision I and Final Decision II, respectively, for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d) (2008).

II.

We have jurisdiction over Dr. Wadhwa's appeal pursuant to 28 U.S.C. § 1295(a)(9) (2006). Pursuant to 5 U.S.C. § 7703(c) (2006), we must affirm a decision of the Board unless we find it to be "(1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required without procedures

required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." See also Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361. (Fed. Cir. 1998).

Dr. Wadh(w)a was appointed to his position as a DVA physician under 38 U.S.C. § 7401(1) (2006). For that reason, he is generally not an employee for purposes of filing an appeal to the Board. See 5 U.S.C. § 7511(b)(10) (2006); Bonner v. Dep't of Veterans Affairs Pittsburgh Healthcare Sys., 477 F.3d 1343, 1348 (Fed. Cir. 2007) ("[E]mployees hired under 38 U.S.C. § 7401(1) . . . have never had the right to appeal § 7512-type adverse actions to the MSPB . . . .").

However, employees such as Dr. Wadhwa may appeal to the Board under limited circumstances. In James v. Von Zemenszky, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), this court held that reduction-in-force ("RIF") regulations apply to DVA health care professionals who are separated by a staff adjustment.

In addition, we stated that "[DVA] health-care professionals enjoy the protections of title 5 RIF procedures along with the right to appeal a RIF separation to the Board." Id. at 1321. RIF appeals to the Board, though, are limited by 5 C.F.R. § 351.901 to appeals by

"employees who are furloughed for more than 30 days, separated, or demoted by the RIF action." Wolf v. Dep't of Veterans Affairs, 317 F.3d 1395, 1396 (Fed. Cir. 2003).

On appeal, Dr. Wadhwa contends that the Board had jurisdiction over his appeals because he was demoted by a RIF action and because, through his reassignment, he suffered loss of pay or grade.

An employee's official position under RIF regulations is defined by grade as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or "SF-50"). In this case, the SF-50 submitted by both parties fails to reflect a loss of pay or grade. The SF-50 indicates that Dr. Wadhwa was transferred from one full-time physician position to another full-time physician position with the same grade. The SF-50 also indicates that Dr. Wadhwa's basic rate of pay at his NIHCS position and at the PVAMC position to which he was reassigned were the same.

Dr. Wadhwa argues, however, that he suffered a loss of grade because the DVA "separated" him from his clinical physician duties and reassigned him to non-clinical physician duties. The contention is without merit. Alteration of duties does not constitute a separation or loss of grade under RIF

regulations. See Aliota v. Dep't of Veterans Affairs, 60 M.S.P.R. 491, 495 (1994) ("As a general rule, the Board does not have appellate jurisdiction over reassignments that do not constitute a reduction in grade or pay, even though reassignment reduces the employee's status, duties, or responsibilities.").

Also without merit is Dr. Wadhwa's contention that he suffered a loss of pay in the form of a $5,000 performance award and $2,257 in locality pay. Loss of pay is calculated on the basis of an employee's rate of basic pay, excluding additional pay of any kind such as locality payments or special rate supplements. See 5 C.F.R. § 531.203 (2008).

Because Dr. Wadhwa did not suffer a loss of either grade or pay, he was not demoted under RIF regulations. Accordingly, the Board did err in dismissing his appeals for lack of jurisdiction. See Talley v. Dep't of the Army, 50 M.S.P.R. 261, 263 (1991).

For the foregoing reasons, the two final decisions of the Board which are on appeal in this case are **affirmed**.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-07-0313-I-1
DATE: July 24, 2007

Adam H. Feinstein, Esquire, Philadelphia,
Pennsylvania, for the appellant.
Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

BEFORE
Elizabeth D. Milligan
Administrative Judge

INITIAL DECISION

On March 23, 2007, Dom Wadhwa (appellant) petitioned for appeal to the Board claiming that the Department of Veterans Affairs (agency) had reduced his

pay. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Background The appellant seeks review of the agency's decision to transfer him from a clinical position to a non-clinical position and alleges that the reassignment affected his pay negatively. He states that he was reassigned from Philadelphia (PVAMC) to Indiana (VA NICHS) on October 14, 2006. Appeal File (AF), Tabs 1, 8, and 9. His salary at the PVAMC was $177,257, and was changed to $175,000 at the VA NICHS because the locality pay was reduced from $60,257.00 to $58,00.00.

His superiors told him that a waiver would be requested so that his pay would be returned to his salary at PVAMC. The agency then decided to return him to the PVAMC, effective January 21, 2007. His pay at that time was $180,040, with the VA NICHS. Upon his return to the PVAMC, his pay was set at $180,040, with the locality pay being $58,000.00 in both positions.

The agency argues that his pay has not been reduced. The appellant argues that his pay would have been higher had he remained at the PVAMC and never been reassigned

because he would have continued to receive the higher locality pay.1 The appellant's base salary in both positions was $122,040.00. AF, Tabs 1, 8 and 9.

In addition, the agency states that the appellant was hired as an excepted service appointment under 38 U.S.C. § 7401(1) and thus holds a position within the Veterans Health Administration that has been excluded from the competitive service and the provisions of Title 5 of the U.S. Code. Therefore, he is not an employee for purposes of filing an appeal with the Board under 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(A)(ii). AF, Tab 9.

The appellant filed the instant appeal with the Board seeking review of the agency's alleged reduction in pay. AF, Tab 1. Because it appeared that the Board lacked jurisdiction over this appeal, an acknowledgment order was issued outlining the jurisdictional issue, and directing the appellant to file evidence and argument showing that his appeal is within the jurisdiction of the Board. AF, Tabs 11 and 24.

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1 This pay is formally known as the "P&D market pay." AF, Tab 9(4C).

The appellant argued that the agency had reduced his pay by approximately $2,000.00 through a staff adjustment, and as a VHA medical professional, the reduction was an appealable action. AF, Tab 3, 5, 6, 7, and 8.

The agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the Board does not have jurisdiction over Title 38 employees. AF, Tab 9.

Applicable Law on Jurisdiction

The appellant has the burden of proving jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(c).

A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

An appellant is entitled to a hearing on the issue of Board jurisdiction only if he makes a nonfrivolous allegation that the Board has jurisdiction over his appeal. *Burgess v. Merit*

Systems Protection Board, 758 F.2d 641, 643 (Fed. Cir. 1985).

In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

The appellant has not raised a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing.

The Board has held that an employee appointed under 5 U.S.C. § 7401(1) has generally been excluded from coverage under the provisions of Title 5 and is not an employee eligible to appeal an action to the Board under 5 U.S.C. §§ 7511- 7513. *See Bouchard v. Department of Veterans Affairs*, 104 M.S.P.R. 686, 688-70 (2007).

Under *James v. Von Zemenszky*, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit held that reduction-in force (RIF) regulations apply to Veterans Health Administrative health care professionals who are appointed under Title 38 and who are separated by a staff adjustment.

Assuming that the appellant might have appeal rights under the above Case law, however, I still find that the action alleged is not appealable to the Board. RIF appeals are limited to employees who are "furloughed for more than 30 days, separated, or demoted by the reduction in force action." *Wolf v. Department of Veterans Affairs*, 317 F.3d 1395, 1396 (Fed. Cir. 2003), *citing*5 C.F.R. § 351.901.

Demotion under the RIF regulations is defined as "a change of an employee while serving continuously within the same agency ...(i) [t]o a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or (ii) [t]o a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories." 5 C.F.R. § 2109102(b)(4)(ii).

Here, it appears that the reassignments were conducted under the same pay method categories. The pay plan is noted as "VM" for both reassignments, and the pay basis is "PA." The grade or level is shown as "PHYS," presumably for physicians, and the step or rate is shown as "II." AF, Tabs 9(4A-4C). It also appears that both positions were not in an "ungraded wage schedule."**2**

Therefore, the reassignments do not constitute a change to a lower grade or a change to a position with a lower rate of pay when both the old and the new positions are not under the same type ungraded wage schedule, and are not in different pay method categories.

Thus, the appellant has not raised a non-frivolous allegation that he suffered a demotion under the RIF regulations.**3** *Cf.*

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2 Title 38 of the U.S. Code, Chapter 74, is the appointing authority for VHA physicians and sets the special pay rates. Section 7404 defines the grade levels. 5 U.S.C. § 7404.

3 At Part 531 of Title 5 of the Code, OPM recently promulgated new regulations regarding the administration of pay under the general schedule. *See* 5 C.F.R. § 531.203. In *Kile v. Department of the Air Force*, the Board found that the term "rate of basic pay" previously was defined in 5 C.F.R. § Part 531 as "the rate of pay fixed by law or administrative action for the position held by an employee before any

deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202 (2006).

Following enactment of the Federal Workplace Flexibility Act of 2004, Pub. L. No. 108-411, 2004 U.S.C.C.A.N. (118 stat.) 2305, which statutorily redefined "rate of basic pay" within the context of graded and pay retention to include locality pay, OPM issued interim regulations that redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006). **Those regulations apply to special pay rate categories such as those at issue here for Title 38 professionals.** *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

I have not determined whether those regulations apply to the RIF regulations in defining the "rate of pay" for purposes of a demotion under a RIF action. Such a determination is not necessary because the appellant has not shown that the reassignments were to positions in different pay methods or in the same ungraded wage schedule.

I also note that the locality pay did not change for the last reassignment.

The appellant alleges that if the agency had not reassigned him in the first place, he would be receiving higher pay because he lost locality pay in the first reassignment. He did not appeal the first reassignment when it occurred. Thus, issues also arise as to whether the appellant can claim that the second reassignment is a reduction in locality pay because he would have been making more if not for the first reassignment.

In addition, if the appellant is raising the issue of the first reassignment, his appeal of that issue might be untimely. Again, however, it is unnecessary to decide

those issues because the appellant's claim of a reduction in pay does not fit within the definition of demotion for RIF purposes.

McGauley v. Veterans Administration, 29 M.S.P.R. 686, 689 (1986) (RIF regulations speak specifically to a demotion rather than a reduction in grade or pay).

The appellant has failed to make a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing. Accordingly, the agency's motion to dismiss the appeal must be GRANTED, and the appeal must be **DISMISSED**.

DECISION

The appeal is **DISMISSED**.

FOR THE BOARD:

_____

Elizabeth D. Milligan
Administrative Judge
Phone: (215) 597-9960
Fax: (215) 597-3456

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-07-0313-I-1

DATE: January 29, 2008

Adam H. Feinstein, Esquire, Philadelphia,
Pennsylvania, for the appellant.
Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

BEFORE
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.

We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we **DENY** the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se

Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:
Washington, D.C.

_____

William D. Spencer
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-3443-07-0638-I-1

DATE: October 31, 2007

Dom Wadhwa, Philadelphia, Pennsylvania, pro se.

Joseph M. Lytle, Philadelphia, Pennsylvania, for the agency.

BEFORE
Elizabeth D. Milligan
Administrative Judge

INITIAL DECISION

On September 20, 2007, Dom Wadwha (appellant) petitioned for appeal to the Merit Systems Protection Board (Board), seeking

review of the decision by the Department of Veterans Affairs (agency or VA) to reassign him and alleging that the reassignment constituted a reduction in force (RIF) action. For the reasons discussed below, this appeal is DISMISSED.

ANALYSIS AND FINDINGS

The appellant was reassigned from his position as a primary care physician at the Philadelphia VA Medical Center (PVAMC) to the Northern Indiana Healthcare System (NICHS) on October 14, 2006. Appeal File (AF), Tab 1. He was reassigned again to the PVAMC on January 21, 2007.

Upon his return, the appellant was placed into a position as a physician in the Compensation and Pension Section (C&P). He argues that he was told the placement would be temporary, but on September 12, 2007, the appellant was informed by his supervisor that he was being permanently reassigned to the C&P position. AF, Tab 6. The appellant petitioned for appeal to the Board from the reassignment action. AF, Tab 1.

Because it appeared that the Board lacked jurisdiction over this appeal, an acknowledgment order was issued outlining the jurisdictional issue, and directing the appellant to file evidence and argument

showing that his appeal is within the jurisdiction of the Board. AF, Tab 2.

The appellant argued that the agency had reduced his pay by its decision not to award him a $5,000.00 performance award and that his placement in a non-clinical position from his original clinical position was a demotion. He argues that he was separated from his earlier clinical position and placed into a permanent position constituting a staff adjustment and a RIF. AF, Tabs 1 and 6.

The agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the appellant has not suffered a separation, demotion through either a loss of grade or pay, or a RIF action. Therefore, the Board does not have jurisdiction over this appeal. AF, Tabs 5 and 9. The record on the jurisdictional issue closed on October 15, 2007. AF, Tab 2.

Applicable Law on Jurisdiction

The appellant has the burden of proving jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(c). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to

be true than untrue. 5 C.F.R. § 1201.56(c)(2). The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

An appellant is entitled to a hearing on the issue of Board jurisdiction only if he makes a nonfrivolous allegation that the Board has jurisdiction over his appeal. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).

In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

The appellant has not raised a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing.

The appellant was hired under an excepted service appointment pursuant to 38 U.S.C. § 7401(1) and thus holds a position within the Veterans Health Administration that has been excluded from the competitive service and the provisions of Title 5 of the U.S. Code. Therefore, he is generally not an employee for purposes of filing an appeal with the Board under 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(A)(ii); *see Bouchard v. Department of Veterans Affairs*, 104 M.S.P.R. 686, 688-70 (2007).

Under *James v. Von Zemenszky*, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), however, the U.S. Court of Appeals for the Federal Circuit held that reduction-in-force (RIF) regulations apply to Veterans Health Administrative health care professionals who are appointed under Title 38 and who are separated by a staff adjustment.

Upon review, I find that the appellant's case does not fall within the RIF exception defined by *Von Zemensky*. RIF appeals are limited to employees who are "furloughed for more than 30 days, separated, or demoted by the reduction in force action." *Wolf v. Department of Veterans Affairs*, 317 F.3d 1395, 1396 (Fed. Cir. 2003), *citing* 5 C.F.R. § 351.901. Demotion under the RIF regulations is defined as "a change of an employee while

serving continuously within the same agency ...(i) [t]o a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or (ii) [t]o a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories." 5 C.F.R. § 2109102(b)(4)(ii).

The Standard Form (SF) 50 submitted by both parties shows that the appellant did not suffer loss of grade or pay in the reassignment. AF, Tabs 5 and 7. The reassignments were conducted under the same pay method categories.

The pay plan is noted as "VM" for both reassignments, and the pay basis is "PA." The grade or level is shown as "PHYS," presumably for physicians, and the step or rate is shown as "II." AF, Tabs 5(4B) and 7. The basic rate of pay and additional pay are $122,040 and $58,000 respectively for both positions. Thus, the appellant did not receive any loss of grade or pay.

The appellant argues that on July 12, 2007, he suffered a loss of pay when he was not given a performance award of $5,000.00. AF, Tab 6. The loss of a performance award is not a demotion under the RIF regulations.

Thus, the appellant has not raised a nonfrivolous allegation that he suffered a demotion under the RIF regulations.1 *Cf*

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1 At Part 531 of Title 5 of the Code, OPM recently promulgated new regulations regarding the administration of pay under the general schedule. *See* 5 C.F.R. § 531.203.

In *Kile v. Department of the Air Force*, the Board found that the term "rate of basic pay" previously was defined in 5 C.F.R. § Part 531 as "the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202 (2006).

Following enactment of the Federal Workplace Flexibility Act of 2004, Pub. L. No. 108-411, 2004 U.S.C.C.A.N. (118 stat.) 2305, which statutorily redefined "rate of basic pay" within the context of graded and pay retention to include locality pay, OPM issued interim regulations that redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006).

Those regulations apply to special pay rate categories such as those at issue here for Title 38 professionals. *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

I have not determined whether those regulations apply to the RIF regulations in defining the "rate of pay" for purposes of a demotion under a RIF action. Such a determination is not necessary because the appellant has not shown that the reassignments were to positions in different pay methods or in the same ungraded wage schedule.

McGauley v. Veterans Administration, 29 M.S.P.R. 686, 689 (1986) (RIF regulations speak specifically to a demotion rather than a reduction in grade or pay).

Similarly, the appellant's claims that he has been moved from a clinical physician position to a non-clinical physician position do not transform the reassignment into a demotion cognizable under the RIF regulations.

As no RIF action has been taken, the appeal concerns a straightforward reassignment. It is well settled that the Board lacks the authority to review a reassignment which does not involve the loss of pay or grade, either voluntary or involuntary. *See Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991).

As discussed above, the Board generally does not have jurisdiction over Title 38 employees absent an allegation of RIF. Finally, the appellant's bare allegations of wrongs do not bring the reassignment within the Board's jurisdiction. *See Weyman v. Department of Justice*, 58 M.S.P.R. 509, 512 (1993); *Lemon v. Department of Labor*, 44 M.S.P.R. 43, 45 (1990) (the Board does not have jurisdiction over all actions that are alleged to be incorrect).

In summary, I find that the appellant has failed to make a nonfrivolous allegation that the agency demoted him through the reassignment, that he has been subjected to a RIF action, or that he is an employee with appeal rights to the Board. Thus, he has failed to raise a non-frivolous allegation of jurisdiction sufficient to warrant a hearing. Accordingly, the agency's motion to dismiss the appeal must be GRANTED, and the appeal must be **DISMISSED**.

DECISION

The appeal is **DISMISSED**.

FOR THE BOARD:

_____

Elizabeth D. Milligan
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOM WADHWA,
Appellant,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
PH-3443-07-0638-I-1

DATE: January 29, 2008

Dom Wadhwa, Philadelphia, Pennsylvania,
pro se.

Stacey Conroy, Esquire, Philadelphia,
Pennsylvania, for the agency.

BEFORE
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.

We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we **DENY** the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov.

Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular

relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:
Washington, D.C.

_____

William D. Spencer
Clerk of the Board

Exhibit A

United States Merit Systems Protection Board
Office of Appeals Counsel
Memorandum

TO: The File
FROM: Edith McGee, Attorney-Adviser

DATE: December 4, 2007

SUBJECT: *Dom Wadhwa v. Department of Veterans Affairs*

MSPB Docket No. PH-3443-07-0638-I-1

Settlement discussions were undertaken in this appeal, but a settlement agreement was not reached.

Please note:

In October 2007, *Impersonator* Telephone Call from an *unknown* agency official at PVAMC claiming to be Petitioner himself and claiming Petitioner had contacted the MSPB hotline for settlement of this U.S. Court of Appeals for the Federal Circuit Case No. 2008-3176, -3177 *(MSPB Docket No. PH-3443-07-0638-I-1)*

Exhibit B

Petitioner's SF-50 from October 15, 2006 from PVAMC which shows under 12 D. Other Pay of $60, 257.

Petitioner's SF-50 from January 21, 2007 from PVAMC which shows under 12 D. Other Pay of $ 58, 000.

Please note: Petitioner was gone from PVAMC to NIHCS for three workdays only and his salary was reduced by $ 2,257.

Exhibit C

In Summary, a Ten Member Panel was convened at PVAMC in January 2007 by Petitioner's Supervisors to:

1. **Remove Petitioner from his over 20-year clinical position**
2. **Demote Petitioner to a nonclinical position**
3. **Reduce Petitioner's Salary**
4. **Deny Petitioner's Performance Pay**
5. **Hire another physician for Petitioner's clinical position, so Petitioner could never return to it.**

NOTE: This order is nonprecedential.

United States Court of Appeals For The Federal Circuit

2008-3176, -3177

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for review of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

ORDER

Before Rader, Circuit Judge, Schall, Circuit Judge, and Prost, Circuit Judge.

A petition for **rehearing** having been filed by the Petitioner,

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, **DENIED**.

FOR THE COURT,
sd/Jan Horbaly
Clerk

Dated: 10/31/2008
cc: Dom Wadhwa
Jeffrey Gauger
WADHWA v. MSPB 2008-3176
(MSPB – PH0752070313-I-1)

NOTE: This order is nonprecedential.

United States Court of Appeals For The Federal Circuit

2008-3176, -3177

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for review of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

ON MOTION

Before RADER, SCHALL, and PROST, Circuit Judges.

ORDER

Petitioner Dom Wadhwa moves to **stay the mandate**.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is **denied.**

FOR THE COURT:
sd/ Jan Horbaly, Clerk

November 4, 2008

cc: Dom Wadhwa
Jeffrey A. Gauger

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(2)

Supreme Court, U.S.
FILED
DEC 2 2 2008
OFFICE OF THE CLERK

No. 08 – 0702

In The
Supreme Court of the United States

DOM WADHWA, M.D., *pro se*
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

GREGORY G. GARRE, Esquire,
United States Solicitor General
JEFFREY A. GAUGER, Esquire,
Attorney for the Respondent
B. CHAD BUNGARD, Esquire,
Attorney for the Respondent
CALVIN M. MORROW, Esquire,
Attorney for the Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITIONER'S REPLY BRIEF

DOM WADHWA, M.D., *pro se*
215 E Camden Avenue, H-13
Moorestown, NJ 08057
Telephone: (609) 220-2771 (cell)

RULE 29.6 STATEMENT

I am a *pro se* Petitioner, therefore, the corporate disclosure statement was not included in the petition for a writ of certiorari.

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Exhibit B: Order
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Exhibit C: Informal Brief
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Exhibit G: Listing of Briefs
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PETITIONER'S REPLY BRIEF

I. Introduction

I am in receipt of the "Waiver" from Gregory G. Garre, Esquire, United States Solicitor General, dated December 9, 2008, that was filed in this Honorable Court in response to my petition for a writ of certiorari, Docket No. 08-0702, dated November 26, 2008.

The December 9, 2008 waiver from Mr. Garre states, as follows: "The Government (Philadelphia VA Medical Center or 'PVAMC' or 'Agency' and the Merit Systems Protection Board or 'MSPB' or 'Board') hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court." **(Exhibit A)**

I assert that the Government waives its right to file its response to my petition for a writ of certiorari, because three Attorneys, namely, Jeffrey A. Gauger, Esquire, B. Chad Bungard, Esquire, and Calvin M. Morrow, Esquire, Respondents for the Government, misinformed and misrepresented the facts of my case in their *flawed* and *inaccurate* Informal Brief to the United States Court of Appeals for the Federal Circuit ("Court"). Therefore, Mr. Garre, on behalf of the Government, has waived the right to file a response to my petition for a writ of certiorari.

II. Petitioner's Procedural History and Facts

The following facts should be taken into consideration:

Fact 1. On May 22, 2008, the United States Court of Appeals for the Federal Circuit issued an Order. **(Exhibit B)**

Honorable Richard Linn, Circuit Judge, states in this Order, as follows: **"The Administrative Judge (AJ)...did not reach the merits of Wadhwa's case..."**

Please note: Judge Linn was not one of the three Circuit Judges who issued the October 7, 2008 Opinion and Judgment on my appeal to the United States Court of Appeals for the Federal Circuit.

Fact 2. The Attorneys for the Board did not provide any evidence whatsoever to support their argument to the Court.

Jeffrey Gauger, Esquire, primary attorney for the Respondent, made numerous erroneous statements in his Informal Brief, dated July 3, 2008. **(Exhibit C- Docket Entry 19)**

Also, Mr. Gauger's Informal Brief was *flawed* and *inaccurate*. He failed to provide any evidence whatsoever to back up his false allegations. In his Informal Brief, he **desperately attempted to destroy my**

credibility with his **false allegations** regarding **unrelated issues** about me and my appeal to the Court.

Fact 3. On July 12, 2008, I responded to Mr. Gauger's *flawed* and *inaccurate* Informal Brief. **(Exhibit D**- Docket Entry 21)

Fact 4. In a letter dated September 4, 2008, I was informed by the Clerk of the Court of the United States Court of Appeals for the Federal Circuit that as a *pro se* petitioner, **I will not be allowed oral argument** for my case.

Therefore, the Opinion and Judgment issued by the Court on October 7, 2008 was based solely on Mr. Gauger's *false and erroneous* statements that he prepared ***based on hearsay*** and with the help of Mr. Bungard and Mr. Morrow. Because I was not given an opportunity by the Court for oral argument, **I was unable to challenge these three attorneys under oath.**

Fact 5. In October 2006, I involuntarily transferred from the Philadelphia Veterans Affairs Medical Center ("PVAMC" or "Agency") to the VA Northern Indiana Health Care System ("NIHCS"), where I was placed on administrative leave for *false charges* of professional misconduct at PVAMC, after only three workdays of employment at NIHCS. This

is a violation of my procedural and substantive rights under the Civil Rights Act of 1964.

Fact 6. In December 2006, I was issued a *Directed Reassignment Order* by **William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management,** to return to PVAMC from NIHCS **allegedly for my professional misconduct** at PVAMC in October 2006. Mr. Feeley issued this order based on untruthful and unsubstantiated information provided to him by my immediate supervisors, Dr. John Murphy and Dr. Michael Grippi.

In December 2006, Mr. Feeley **assumed** that the information provided to him about me by Drs. Murphy and Grippi and by Joseph Pomorski and by Nevin Weaver, two Agency officials at VA Central Office, was factual and truthful regarding my alleged professional misconduct at PVAMC in October 2006. Based on this assumption, Mr. Feeley issued the Directed Reassignment Order. Two months later, in February 2007, I was informed by Mr. Pomorski that Mr. Feeley's **Directed Reassignment Order was not due to my conduct or performance** at PVAMC.

These conflicting statements by Mr. Pomorski in December 2006 and in February 2007 regarding my Directed Reassignment Order avoid the employment contract, avoid RIF

(reduction-in-force) procedures and safeguards, and avoid appeal rights.

I assert that the Agency officials misused their authority and were engaged in prohibited personnel practices, which are also violations of my procedural and substantive rights under the Civil Rights Act of 1964.

Fact 7. In January 2007, I was involuntarily removed and demoted from my tenured clinical position at PVAMC and assigned to perform *nonclinical duties* in the Compensation & Pension (C&P) Section at PVAMC by a ten member panel that was convened by my immediate supervisors, Dr. John Murphy and Dr. Michael Grippi. I was informed by my supervisors that my assignment to the C&P section at PVAMC was a "critical need" for the medical center. Thus, this was a "staff adjustment" to meet the Agency's realignment of its resources to more appropriately support its mission, vision, goals, and objectives.

Fact 8. In January 2007, upon my involuntary assignment to the nonclinical position in the C&P Section at PVAMC, I was given a corresponding drop in salary of $2,257 and I was denied my performance pay of $5,000 by my immediate supervisors, Drs. Murphy and Grippi, after being away from PVAMC and at NIHCS for just three workdays.

Again, I assert that Drs. Murphy and Grippi misused their authority and were engaged in prohibited personnel practices, which are violations of my procedural and substantive rights under the Civil Rights Act of 1964.

Please note: I have suffered a loss from being subjected to *utter humiliation* at the hands of the Agency officials at PVAMC. As a cover-up for their supervisory deficiencies, the Agency officials at PVAMC have taken the following actions against me since the issuance of Mr. Feeley's Directed Reassignment Order to me for my alleged misconduct at PVAMC in October 2006:

1. A demotion, drop in my annual salary, and denial of my performance pay in Primary Care in January 2007
2. Removal from a clinical assignment and placement in a nonclinical assignment on January 21, 2007
3. Proposed removal from my employment, dated January 25, 2007
4. Local Administrative Investigation Board convened at an unspecified date in 2007 for charges of alleged *patient abuse*
5. National Administrative Investigation Board convened on March 13, 2007 to investigate my alleged professional misconduct
6. Reprimand issued to me on April 3, 2007 based not on conduct or performance and with no explanation offered for this disciplinary action by the Agency officials at PVAMC
7. *False Arrest* on June 26, 2007 for alleged theft of government property
8. An attempt to arrest me for false charges of *Battery*, *Assault*, and *Disorderly Conduct* on February 29, 2008
9. Unreasonable *search and seizure* of my personal items in a clear plastic ACME bag on June 27, 2008.

It should be noted that **to date**, the Agency officials at PVAMC have been **unable to provide a shred of evidence** to the Court **of alleged professional misconduct** on my part.

III. The United States Court of Appeals for the Federal Circuit ("Court") Erred in Dismissing Petitioner's Appeal

The United States Court of Appeals for the Federal Circuit erred by dismissing my appeal on October 7, 2008 without oral argument and this decision was unsupported by any evidence.

In January 2007, I was placed in a nonclinical position at PVAMC on the recommendation of a ten member panel. This recommendation was based on the existence of a critical need in the C&P Section, as part of the Agency's resource realignment.

In Wolf v. Dep't of Veterans Affairs, 317 F. 3d 1395, 1396 (Fed. Cir. 2003) it states that "The Board further found that the agency's resource realignment was a staff adjustment."

Also, as a staff physician for the Agency, I am entitled to the protection of Title 5 RIF

(reduction-in-force) procedures along with the right to appeal a RIF separation or demotion to the Board. (See 5 C.F.R. § 351.901 and Wolf v. Dep't of Veterans Affairs, 317 F. 3d 1395, 1396 (Fed. Cir. 2003))

As an employee under 38 U.S.C. §7401 (1) at the Department of Veterans Affairs, I can appeal to the Board under limited circumstances. (See James v. Von Zemenszky, 284 F. 3d 1310, 1314-15 (Fed. Cir. 2002))

In James v. Von Zemensky, the Court held that reduction-in-force ("RIF") regulations apply to DVA health care professionals like me who are separated or demoted by a staff adjustment.

I believe that the Board has jurisdiction over my appeal, because I was permanently removed and demoted from a clinical position to a nonclinical position, based on the Agency's critical need (i.e., a "staff adjustment" and a RIF action by the Agency). As part of this RIF action, the Agency reduced my annual salary by $2,257 and denied my performance pay of $5,000. (See the two different Notification of Personnel Action Standard Form 50s or "SF-50s" issued to me by PVAMC in October 2006 and in January 2007 and the Performance Pay VA Form 10-0432, dated November 17, 2006.)

On the SF-50 issued to me by PVAMC in October 2006, in section 12 D (other pay)**1**, it reported a sum of $ 60,257 and on the SF-50 issued to me by PVAMC in January 2007, in section 20 D (other pay), it reported a sum of $ 58,000 (a loss of pay of $2,257, due to the staffing adjustment by the Agency). **(Exhibit E)** Also, I was denied the performance pay of $5,000 for the period of July 1, 2006 to September 30, 2006. **(Exhibit F)** *Dr. Murphy and Dr. Grippi offered me no explanation for this denial of my performance pay.*

---

1 At Part 531 of Title 5 of the Code, OPM recently promulgated new regulations regarding the administration of pay under the general schedule. *See* 5 C.F.R. § 531.203. In *Kile v. Department of the Air Force*, the Board found that the term "rate of basic pay" previously was defined in 5 C.F.R. § Part 531 as "the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202 (2006).

Following enactment of the Federal Workplace Flexibility Act of 2004, Pub. L. No. 108-411, 2004 U.S.C.C.A.N. (118 stat.) 2305, which statutorily redefined "rate of basic pay" within the context of graded and pay retention to include locality pay, OPM issued interim regulations that redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006). **Those regulations apply to special pay rate categories such as those at issue here for Title 38 professionals.** *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

Please note: I was not assigned to my same clinical position at PVAMC upon my return from NIHCS. At NIHCS, I was assigned to a clinical position. Upon my return to PVAMC, after only three workdays at NIHCS, I was assigned to a nonclinical position at PVAMC, which was a staffing adjustment by the Agency based on a critical need. Contrary to the Court's Opinion and Judgment on my case issued on October 7, 2008, this was not an alteration of duties.

In Aliota v. Dep't of Veterans Affairs, 60 M.S.P.R. 491, 495 (1994) it states "As a general rule, the Board does not have appellate jurisdiction over reassignments that do not constitute a reduction in grade or pay, even though the reassignment reduces the employee's status, duties, or responsibilities." This case is not applicable to my situation.

In my case, the assignment to nonclinical duties, identified as a critical need by the Agency, with a corresponding reduction in pay, was not a reassignment (as stated by the Court), but a realignment of resources - a staff adjustment and a RIF action and, therefore, the Board has appellate jurisdiction for this appeal.

Also with merit is my contention that I suffered a loss of annual pay of $2,257 and of my performance pay of $5,000.

Please note: 5 C.F.R. § 531.203 (2008) does not apply to Title 38 employees like me.

In my situation, annual pay is set forth by 5 C.F.R. § 351.901 and VHA Handbook 5007/21, page IX -19, Preservation of Pay.

Also, OPM's regulations redefined "rate of basic pay" for special rate employees to include, among other types of pay, a "locality rate," in turn defined as a "GS rate ... plus any applicable locality payment." 5 C.F.R. § 531.203 (2006). **Those regulations apply to special pay rate categories** such as those at issue here **for Title 38 professionals**. *See e.g.*, 5 C.F.R. § 530.308, 531.203, 531.602.

Therefore, I did suffer losses of my annual pay, my performance pay, and I was demoted under RIF regulations. **Accordingly, the Board did err in dismissing my appeal for lack of jurisdiction.**

Please note: In Talley v. Dep't of the Army, 50 M.S.P.R. 261, 263 (1991) it states "A **voluntary** reassignment accepted by an employee to avoid the consequences of an impending RIF is not appealable." This was not the case in my situation.

In my case, the assignment to a nonclinical position in the C&P section by a ten member panel at PVAMC was **involuntary** on my part and it was based on a *critical need* for the Agency, and therefore, it is appeable to the Board.

III. CONCLUSION

For the foregoing reasons discussed in this brief, the Opinion and Judgment of the United States Court of Appeals for the Federal Circuit was based on a ***flawed and inaccurate*** Informal Brief by the Respondent. This Informal Brief, in turn, was based on ***hearsay*** and ***without evidence***, and therefore, this Opinion and Judgment of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

sd/
Dom Wadhwa, M.D., *pro se*
Petitioner

Dated: December 22, 2008

Home Address of Petitioner
Dom Wadhwa, M.D.
215 E Camden Avenue, H-13
Moorestown, NJ 08057
Telephone: (609) 220-2771

Exhibit A

Waiver*
by

GREGORY G. GARRE, Esquire
Solicitor General
of the United States

Dated:
December 9, 2008

Government waived its response, because it assumes Repondent's July 3, 2008 Informal Brief is <u>not</u> *<u>flawed</u>* and is *<u>accurate</u>

App. 2

IN THE SUPREME COURT
OF THE UNITED STATES

WADHWA, DOM

Petitioner

No: 08-0702

vs.

MERIT SYSTEMS PROTECTION BOARD

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

GREGORY G. GARRE
Solicitor General
Counsel of Record

December 9, 2008

cc:

DOM WADHWA
215 E CAMDEN AVENUE
H-13
MOORESTOWN, NJ 08057

Exhibit B

Order*
by

Honorable Richard Linn
Circuit Judge

United States Court of Appeals for the Federal Circuit

Dated: May 22, 2008

*This Order states:

"The Administrative Judge (AJ)... did <u>not</u> reach the merits of Wadhwa's case..."

<u>Please note</u>:
Judge Linn was <u>not</u> one of the three judges that issued the Order and Judgment of my case on October 7, 2008.

NOTE: This order is nonprecedential.

United States Court of Appeals For The Federal Circuit

2008-3176, -3177

DOM WADHWA,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for review of the Merit Systems Protection Board in PH0752070313-I-1 and PH3443070638-I-1.

ON MOTION

Before LINN, Circuit Judge.

ORDER

Dom Wadhwa moves to consolidate 2008-3176 and 2008-3177. The Department of Veterans Affairs (DVA) moves to reform the caption in both cases to designate the Merit Systems Protection Board as the respondent. DVA states the Board consents and Wadhwa opposes.

Pursuant to 5 U.S.C. § 7703(a)(2), the Board is designated as the respondent when the Board's decision concerns the procedure or jurisdiction of the Board. The employing agency is designated as the Board reaches the merits of the underlying case.

In the proceedings underlying 2008-3176, Wadhwa filed an appeal alleging that DVA reduced his pay through a job reassignment. The Administrative Judge (AJ) determined that as an employee appointed under 5 U.S.C. § 7401 (1), Wadhwa was not eligible to appeal to the Board an action other than reduction in force (RIF). The AJ determined that Wadhwa had not shown that he suffered a demotion under the RIF regulations and thus dismissed the appeal for lack of jurisdiction. Because **the AJ did not reach the merits of Wadhwa's case**, the Board is the proper respondent.

In the proceedings underlying 2008-3175, Wadhwa filed an appeal alleging that his job reassignment constituted a RIF action. The AJ determined that Wadhwa had not raised a nonfrivolous allegation that he had been subjected to a RIF action and thus dismissed the appeal for lack of jurisdiction. Because **the AJ did not reach the merits of Wadhwa's case**, the Board is the proper respondent.

The court agrees that consolidation is warranted. Wadhwa has already filed separate informal briefs in the two cases. The Board should file a consolidated brief responding to both of Wadhwa's briefs.

Accordingly,

IT IS ORDERED THAT:

(1) The motions to reform the captions in 2008-3176 and 2008-3177 are granted.
(2) The motion to consolidate is granted.
(3) The revised official caption is reflected above.
(4) The Board's consolidated brief is due within 21 days of the date of filing of this order.

May 22, 2008 sd/
Richard Linn
Circuit Judge

cc: Dom Wadhwa
Scott Slater, Esq.
B. Chad Bungard, Esq.
(Copy of Wadhwa's informal brief in 2008-3176 and 2008-3177 enclosed)

Exhibit C
Informal Brief *
By
Jeffrey A. Gauger, Esquire
Attorney for Respondent

Dated: July 3, 2008
(Docket Entry 19)

*Please note:

This Informal Brief was **flawed** and **inaccurate** without any evidence whatsoever.

Mr. Gauger desperately attempted to **destroy Petitioner's credibility** with his *false allegations* of **unrelated issues** about the Petitioner and his Appeal to the Court.

The **Order** and **Judgment** issued by the United States Court of Appeals for the Federal Circuit on October 7, 2008 was **based on** this **flawed** and **inaccurate** Informal Brief.

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DOM WADHWA,
Petitioner,

v. No. 2008-3176,-3177

MERIT SYSTEMS PROTECTION BOARD,
Respondent,

RESPONDENT'S INFORMAL BRIEF

I. NATURE OF THE CASE

Petitioner, Dom Wadhwa ("Dr. Wadhwa"), seeks review of final decisions of the Merit Systems Protection Board ("MSPB" or "Board") that dismissed, for want of jurisdiction, his appeals from the Department of Veterans Affairs's decision to reassign him, alleging that the reassignment constituted a reduction-in-force action. Wadhwa v. Dep't of Veterans Affairs, MSPB Docket No. PH-0752-07-03134-1 (Final Order, Jan. 29, 2008; Initial Decision, July 24, 2007); Wadhwa v. Dep't of Veterans. Affairs, MSPB Docket No. PH-3443-07-06384-1 (Final Order, Jan. 29, 2008; Initial Decision, Oct. 31, 2007); Respondent's Appendix (RA) 1-12, 17-27.

II. STATEMENT OF FACTS AND THE COURSE OF PROCEEDINGS BELOW.

Dr. Wadhwa is employed with the Department of Veterans Affairs ("DVA") as a physician. On October 15, 2006, Dr. Wadhwa was transferred from his physician position at the Philadelphia VA Medical Center ("PVAMC") to a physician position at the Northern Indiana Healthcare System ("NIHCS"). RA 53. Dr. Wadhwa's salary at PVAMC was $177,257, and was changed to $175,000 at NIHCS due to the difference in locality pay. Id. He was then reassigned back to PVAMC as a Compensation and Pension physician on January 21, 2007. RA 54. His pay at that time was $180,040, and remained the same upon his return to PVAMC. Dr. Wadhwa's base salary for both positions was $122,040.00. Id.

Dr. Wadhwa filed two appeals with the Board claiming his reassignment (1) resulted in a reduction in his pay or grade; and (2) constituted a removal. RA 31, 35. The DVA moved to dismiss both appeals on the grounds that Dr. Wadhwa is an employee appointed under 38 U.S.C. § 7401(1), which denies the Board jurisdiction; and Dr. Wadhwa fails to meet any exception conferring Board jurisdiction over his claims. RA 51-54, 83, 86-88.

The administrative judge ("AJ") assigned to Dr. Wadhwa's first appeal, the alleged reduction in his pay or grade, issued a Jurisdictional Order for Dr. Wadhwa to file evidence within one week establishing Board jurisdiction. RA 55-58. When Dr. Wadhwa failed to submit a non-frivolous claim for Board jurisdiction within the specified time period, the record was closed. RA 56. However, the AJ reopened the jurisdictional record on June 22, 2007, giving Dr. Wadhwa another opportunity to establish Board jurisdiction. RA 68-70. At this time, the AJ explicitly outlined what Dr. Wadhwa must allege to establish Board jurisdiction, and ordered both parties to submit briefs on the specific jurisdictional issue. RA 68-69.

When Dr. Wadhwa failed to follow the Order and address the jurisdictional issue at hand, the AJ dismissed the case for lack of jurisdiction on July 24, 2007. RA 4-12, The initial decision became final on January 29, 2008, when the full Board denied Dr. Wadhwa's petition for review. RA 1-3.

On October 31, 2007, Dr. Wadhwa's second claim, the alleged removal, was also dismissed for lack of jurisdiction because he once again failed to follow the AJ's Order and submit a non-frivolous claim for Board jurisdiction. RA 20-27. The initial decision became final on January 29, 2008, when the

full Board denied Dr. Wadhwa's petition for review. RA 17-19.

Dr. Wadhwa has consolidated these two claims into what appears to be a reduction-in-force claim. This appeal followed.

1. Has the petitioner ever had another case in this Court, a United States District Court, or in the Equal Employment Opportunity Commission?

Yes. In addition to this case, the petitioner has another case pending before the Board: Wadhwa v. Dep't of Veterans Affairs, MSPB Docket No. PH-1221-08-0019-W-1. In it, the petitioner raises an alleged reprisal for whistleblowing claim against the DVA. An initial decision was rendered on June 26, 2008, that denied Dr. Wadhwa's request for a corrective action. RA 89.

In addition, Dr. Wadhwa identifies several cases in his brief that he has had before the Equal Employment Opportunity Commission. These cases include: EEO No. 200H-0642- 2005100521; EEO No. 200H-0642-2006100161; and EEO No. 200H-0642-2007101381.

The petitioner also has a case in U.S. District Court for the Eastern District of Pennsylvania: Wadhwa v. Nicholson, Civil Action No. 2:07-cv3301. In this case, Dr.

Wadhwa raises many complaints against the DVA concerning his reassignment. Although the Court consolidated Dr. Wadhwa's four complaints: 07-2677; 07-2750; 07-2997; and 07-1750 into the above case, Petitioner failed to list these cases in his informal brief. As of June 20, 2008, the District Court granted the DVA's motion to dismiss all claims with the exception of a "Bivens Action." RA 90. Dr. Wadhwa also failed to mention a case he has in U.S. District Court for the District of New Jersey: Wadhwa v. Dep't of Veterans Affairs, Civil Action No.1:06-cv04362. In this case, Dr. Wadhwa alleges that the DVA violated the Freedom of Information Act. Aside from all cases listed above, Counsel for respondent is unaware of any other cases filed by petitioner.

2. Did the MSPB incorrectly decide or fail to take into account any facts?

No. Dr. Wadhwa failed to allege facts establishing the Board's jurisdiction over his appeal. Dr. Wadhwa contends the AJ failed to consider that he was "involuntarily assigned" and "separated" from his position. However, as discussed below, these allegations do not establish Board jurisdiction over Dr. Wadhwa's appeal, as the AJ explained in her initial decisions. RA 8-9 ("to the extent that he raised other issues regarding reassignments in general...I have reviewed them and found the

Board lacks jurisdiction over the matters raised"); RA 24 ("appellant's bare allegations of wrongdoings do not bring the reassignment within the Board's jurisdiction").

3. Did the MSPB apply the wrong law?

No. The administrative judge applied the correct law in determining that the Board lacked jurisdiction over Dr. Wadhwa's appeals.

Standard of Review

Under the statutory standard of review, the Court should set aside a decision of the Board only if it finds the Board's decision to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c); Forest v. Merit Systems Protection Board, 47 F.3d 409, 410 (Fed. Cir. 1995). Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which this Court reviews de novo. Id. The Court, however, is bound by the Af s factual findings on which a jurisdictional determination is based "unless those findings are not supported by substantial evidence." Bolton v. Merit Systems Protection Board, 154 F.3d 1313, 1316 (Fed. Cir. 1998). For the reasons set forth below, the Court should affirm the decision of

the Board dismissing Dr. Wadhwa's appeals for lack of jurisdiction.

The Board's jurisdiction is not plenary, but is "limited to those areas specifically granted by statute or regulation." Cowan v. United States, 710 F.2d 803, 805 (Fed. Cir. 1983). The Board has jurisdiction over agency actions when the appeals are authorized by law, rule, or regulation. 5 C.F.R. § 1201.3(a) (2006); Antolin v. Dep't of Justice, 895 F.2d 1395, 1396 (Fed. Cir. 1989), cert. denied, 498 U.S. 868 (1990). The burden rests on the employee to prove, by a preponderance of the evidence, that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2)(i); See Garcia v. Dep't of Homeland Security, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en bane) (if the Board determines that the claimant fails to prove jurisdiction by a preponderance of the evidence, then the Board does not have jurisdiction and the case is dismissed for lack of jurisdiction). Dr. Wadhwa failed to meet this burden, and thus the Board properly dismissed his claims for lack of jurisdiction.

Argument

Dr. Wadhwa alleges that the DVA reduced his pay and demoted him through a reduction-in-force ("RIF") action. Dr. Wadhwa is a physician for the DVA appointed under 38 U.S.C. § 7401(1). Therefore, he is generally not an employee for purposes of filing an appeal to the

Board. 5 U.S.C. §7511(b)(10); Bonner v. Dep't of Veterans Affairs Pittsburgh Healthcare System, 477 F.3d 1343, 1348 (Fed. Cir. 2007)(employees appointed under 38 U.S.C. § 7401(1) have never had the right to appeal adverse actions).

However, as the AJ pointed out, Title 38 employees may appeal to the Board under limited circumstances. In James v. Von Zemenszky, this Court held that RIF regulations apply to Veterans Administrative health care professionals appointed under Title 38 who are separated by a staff adjustment. 284 F.3d 1310, 1314-15 (Fed. Cir. 2002). Further, RIF appeals to the Board are limited to employees who are "furloughed for more than 30 days, separated, or demoted by the RIF action." Wolf v. Dep't of Veterans Affairs, 317 F.3d 1395, 1396 (Fed. Cir. 2003), citing 5 C.F.R. § 351.901. .Dr. Wadhwa fails to meet any of these exceptions.1

1In Dr. Wadhwa's informal brief submitted to this court he contends that the AJ incorrectly applied the Von Zemenszky decision. However, not only did the AJ correctly apply the Von Zemenszky decision, she explicitly outlined what Dr. Wadhwa must allege to qualify for the Von Zemenszky exception and establish Board jurisdiction for a RIF appeal. RA 68-70. Dr. Wadhwa failed to do so.

While Dr. Wadhwa attempts to argue he was "demoted" by a RIF action to establish Board jurisdiction, he fails to attach any legal meaning to the term in any of his allegations. RA 68. A demotion for purposes of RIF actions is defined as:

> a change of an employee while serving continuously within the same agency; (i) To a lower grade when both the old and new positions are under the General Schedule or under the same type graded wage schedule; or(ii) To a position with a lower rate of pay when both the old and new positions are under the same type ungraded wage schedule, or are in different pay method categories.

5 C.F.R. § 210.102 (b)(4). Dr. Wadhwa did not suffer loss of pay or grade in his reassignment according to the SF-50 submitted by both parties.[2] RA 54.

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[2] An employee's official position under RIF regulations is defined by grade as documented on the employee's most recent Notification of Personnel Action (Standard Form 50). 5 C.F.R. § 531.203.

Dr. Wadhwa's grade remained the same at both positions. His grade remained "PHYS," rate "II," and he was not in an "ungraded rate schedule."3 RA 53-54. Dr. Wadhwa was transferred from one full-time physician position to another full-time physician position with the same grade. Id.

Dr. Wadhwa alleges he suffered a loss of grade because the DVA "separated" him from his clinical physician duties and reassigned him to non-clinical physician duties. However, this is not a separation or a loss of grade according to RIF regulations. The fact that Dr. Wadhwa deems his new physician duties less desirable does not grant him a legal right to appeal to the Board. See Aliota v. Dep't of Veterans Affairs, 60 M.S.P.R. 491, 495 (1994)("generally, the Board does not have appellate jurisdiction over reassignments that do not constitute a reduction in grade or pay, even though reassignment reduces employee's status, duties, or responsibilities"). Dr. Wadhwa did not suffer a loss of grade and therefore was not demoted.

Further, Dr. Wadhwa's rate of basic pay remained the same at both positions. His pay plan is denoted as "VM" and "PA" for the pay basis for both positions. RA 53-54.

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3 Grade levels for VHA physicians, such as Dr. Wadhwa, are defined in 5 U.S.C. § 704.

The basic rate of pay for Dr. Wadhwa's first reassignment, from PVAMC to NIHCS, remained $117,000 for both positions. RA 53. The basic rate of pay and additional pay for Dr. Wadhwa's second reassignment, from NIHCS back to PVAMC, are $122,040 and $58,000 respectively for both positions. RA 54.

While Dr. Wadhwa contends he suffered loss of pay in the form of a $5,000 performance award and $2,257 loss of locality pay, these arguments are invalid. Loss of pay is calculated by employee's rate of basic pay, excluding additional pay of any kind such as locality payments or special rate supplements. See 5 C.F.R. § 531.203. Therefore, Dr. Wadhwa's only allegations of loss of pay, a loss of a $5,000 performance award, a special rate supplement, and loss of $2,257 in locality pay are not classified as a loss of pay according to the RIF regulations.

Dr. Wadhwa neither suffered loss of grade nor loss of pay; he was transferred to a full-time physician position with the same grade and pay. Therefore, he was not demoted under RIF regulations. Rather, Dr. Wadhwa was reassigned, "changed from one position to another without promotion or demotion." 5 C.F.R. § 531.203. The Board has no jurisdiction to review assignment cases which do not involve loss of pay or grade, either voluntarily or involuntarily. See Talley v. Dep't of the

Army, 50 M.S.P.R. 261, 263 (1991).4 Therefore, the Board properly dismissed Dr. Wadhwa's appeal for lack of jurisdiction.5

4. Did the MSPB fail to consider important grounds for relief?

No. The administrative judge properly determined that Dr. Wadhwa's appeal was not within the' Board's jurisdiction. Once that determination was made, the appeal was properly dismissed and there were no other grounds for relief that could be considered.

5. Are there other reasons why the MSPB's decision was wrong?

No. Dr. Wadhwa alleges that the AJ prematurely closed the record. However, the AJ issued an Order dated April 26, 2007

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4 Even if Dr. Wadhwa had properly alleged an "involuntary reassignment" claim, the Board would still lack jurisdiction because Dr. Wadhwa did not suffer a loss of pay or grade.

5 Dr. Wadhwa also claims the AJ failed to apply the Isabella v. Dep't of State, 102 M.S.P.R. 259(2006) decision. However, it is unclear how Isabella, a case involving a veterans' preference employee who made a specific, non-frivolous allegation to the Board that the agency violated his veterans' preference rights by failing to consider him for an appointment, applies to Dr. Wadhwa, a non-veterans' preference eligible employee.

directing Dr. Wadhwa to file evidence establishing Board jurisdiction within seven days. RA 55-58. When Dr. Wadhwa failed to do so, the record closed. Both the AJ and full Board considered all submissions before closing the record and rendering decisions.

The AJ did not "ignore the Appellant's response dated May 1, 2007 or October 5, 2007," which alleged the Von Zemenszky decision confers Board jurisdiction over Dr. Wadhwa's "adverse action" claims. RA 59, 71-82. The AJ addressed Von Zemenszky and explained why it does not apply to Dr. Wadhwa's appeal, RA 7, 22.

6. What relief do you want the court to take in this case?

The Court should affirm the decision of the MSPB.

7. Do you want to argue before the court in person?

No.

Respectfully submitted,

B. CHAD BUNGARD
General Counsel

CALVIN M. MORROW
Acting Assistant General Counsel

JEFFREY A. GAUGER
Attorney
Office of the General Counsel
Merit Systems Protection Board
1615 M Street," NW
Washington, DC 20419-0002
(202) 653-6772 Ext. 1294

DATE: July 3, 2008

Exhibit D

Petitioner's Response to the *flawed and inaccurate Informal Brief* by Jeffrey Gauger, Esquire, Attorney for the Respondent

Dated: July 12, 2008 (Docket Entry 21)

THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, DC 20439

DOM WADHWA, M.D., *pro se*
Petitioner

v.

Docket No.
2008-3176,-3177

MERIT SYSTEMS
PROTECTION BOARD,
Respondent

Petitioner's Motion Opposing Respondent's Informal Brief

Petitioner, Dom Wadhwa, M.D., ("Dr. Wadhwa") respectfully files a motion with this Honorable Court opposing the Respondent's (Merit Systems Protection Board, or "Board") Informal Brief, filed on July 3, 2008.

Petitioner, Dr. Wadhwa notes that the Board has raised several issues in this Informal Brief

that he had not discussed on the Appeal to this Court regarding Docket Number: 2008-3176, -3177. These issues are discussed by the Petitioner in detail below.

Petitioner Opposes the following information in Respondent's Statement of Facts and the Course of Proceedings

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

1. *"Dr. Wadhwa was transferred from his physician position at the Philadelphia VA Medical Center (PVAMC) to a physician position at the Northern Indiana Health Care System (NIHCS)."*

THE FACTS ARE AS FOLLOWS:

1. On October 15, 2006, I (Dr. Wadhwa) transferred involuntarily from my clinical staff physician position at the Philadelphia VA Medical Center (PVAMC) to a clinical staff physician position at the Northern Indiana Health Care System (NIHCS). I (Dr. Wadhwa) sent an e-mail to Bradley Shelton, Acting VISN 4 Network Director, on October 13, 2006

explaining the circumstance for my departure from PVAMC to NIHCS.

2. I (Dr. Wadhwa) was issued a Directed Reassignment Order by William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management to return, after three work days, from my staff physician position at NIHCS to my previous staff physician position at PVAMC allegedly for a pending removal action from my over twenty year tenured employment within the Department of Veterans Affairs. In fact, there was no removal action pending at PVAMC.

3. Upon my return to PVAMC, in January 2007, Dr. Murphy and Dr. Grippi, my two immediate supervisors, convened a meeting composed of ten members which included:

Michael Sullivan, former Medical Center Director
Margaret O'Shea-Caplan, Associate Director
Martin Heyworth, M.D., Chief of Staff
Carol Patterson, VP for Medicine Service
Jose Lopez, Esquire, Regional Counsel
Gerald Morelli, Director of Human Resources

Dr. Murphy and Dr. Grippi persuaded these individuals into recommending my removal from my clinical position in Primary Care and my demotion to a nonclinical position in the Compensation and Pension (C&P) Section.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

2. ***"Dr. Wadhwa's salary... was changed...at NIHCS due to difference in locality pay."***

THE FACTS ARE AS FOLLOWS:

a. The Chief of Staff at NIHCS stated to me that after I begin my employment at NICHS that a waiver request will be sent to VA Central Office and once this waiver is approved my salary would remain the same as it was at PVAMC. After just three workdays at NIHCS I was placed on Administrative Leave for "unresolved employment issues at PVAMC" prior to my transfer to NIHCS. Thus, this waiver request to VA Central Office was never filed by Human Resources at NIHCS.

b. Upon my return to PVAMC, in January 2007, Dr. Murphy and Dr. Grippi did not carry out the Directed Reassignment Order from Mr. Feeley of returning me to previous staff physician position in Primary Care. Instead, I was considered a "newly hired employee" at PVAMC. Thus, there was a drop in my market pay by $2,257 upon my return to PVAMC.

Please note: Dr. Murphy and Dr. Grippi dropped my market pay in order to punish me for my protected disclosure of the unsafe working conditions at the Outpatient Clinics in Primary Care at PVAMC and wanted to cover-up their failure to follow VA policies and procedures for issuance of an unsatisfactory annual proficiency report that they issued to me on December 7, 2005, which contained statement that were untruthful and unsubstantiated.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

3. *"Dr. Wadhwa is an employee under 38 U.S.C. §7401 (1) which denies the Board jurisdiction; Dr. Wadhwa fails to meet any exception conferring Board jurisdiction over his claims."*

THE FACTS ARE AS FOLLOWS:

In January 2007, upon my return to PVAMC, I was verbally informed by Dr. Murphy that my new assignment in the C&P Section was based on a temporary 'critical need' in the C&P Section not to exceed 30 days. Nine months later, I was informed via e-mail for the first time that this assignment in C&P Section is

permanent. Thus, my reassignment to C&P section constitutes a reduction-in-force (RIF) action with reduction in pay. Therefore, I meet the exception conferring Board jurisdiction over my claims.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

4. *"Dr. Wadhwa is an employee under 38 U.S.C.§ 7401 (1) which denies the Board jurisdiction; Dr. Wadhwa fails to meet any exception conferring Board jurisdiction over his claims."*

THE FACTS ARE AS FOLLOWS:

In James v. Von Zemenszky, 284 F.3d 1310, 1319-21 (Fed. Cir. 2002), the court held that the Department of Veterans Affairs (DVA) must use Title 5 RIF procedures when conducting a "staff adjustment" involving medical professionals appointed under 38 U.S.C. § 7401(1). In Isabella v. Department of State, 102 M.S.P.R. 259, (2006), the Board stated that the Von Zemenszky court found that "title 5 reduction-in-force provisions applied to Veterans Health Administration (VHA) health-care professionals."

Thus, in my situation, Dr. Murphy's and Dr. Grippi's offer to me of an assignment to a temporary position that was later converted to a permanent position in the C&P section as a "staff adjustment" in lieu of a RIF separation from a full-time clinical position in Primary Care, would be an appealable RIF action.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

5. *"However, the AJ reopened the jurisdiction record on June 22, 2007, giving Dr. Wadhwa another opportunity to establish Board jurisdiction. At this time, the AJ explicitly outlined what Dr. Wadhwa must allege to establish Board jurisdiction, and ordered both parties to submit briefs on the specific jurisdictional issue."*

THE FACTS ARE AS FOLLOWS:

On June 22, 2007, the AJ reopened the jurisdictional record and ordered my attorney, on my behalf, to file a brief within 14 days of this order. The Agency contends that its attorney did not receive a copy of a brief regarding the jurisdiction issue from my attorney. Thus, on July 24, 2007, the Agency's attorney filed a motion to dismiss my appeal to

the MSPB, based on her claim that she did not receive this brief from my attorney.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

6. "*When Dr. Wadhwa failed to follow the Order and address the jurisdictional issue at hand, the AJ dismissed the case for lack of jurisdiction on July 24, 2007.*"

THE FACTS ARE AS FOLLOWS:

On June 5, 2007, I sent the following pleading to the Board:

I have designated Adam H. Feinstein, Esquire, as my representative effective May 24, 2007. I request that Mr. Feinstein fully participate in all aspects of my appeal to the Merit Systems Protection Board. His office is located at 1804 Bainbridge Street, Philadelphia, PA 19146; telephone number (215) 432-8335. Please direct all communications to Mr. Feinstein, and provide copies of all written communications to me.

On June 19, 2007, the AJ issued the following Order:

Upon review, I have determined that it is necessary to reopen the jurisdictional record. Under *James v. Von Zemenszky*, 284 F.3d 1310, 1314-15 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit held that reduction-in-force (RIF) regulations apply to Veterans Health Administrative health care professionals who are appointed under Title 38 and who are separated by a staff adjustment.

On July 24, 2007, the AJ issued her Initial Decision as follows:

The appellant has failed to make a nonfrivolous allegation of jurisdiction sufficient to warrant a hearing. Accordingly, the agency's motion to dismiss the appeal must be GRANTED, and the appeal must be DISMISSED.

Please note:
The Initial Decision Order from the AJ was issued on July 24, 2007. This is the same day that the Agency's attorney filed the Agency's motion to dismiss my appeal.

On August 3, 2007, I filed a Petition for Review of the AJs Initial Decision which stated as follows:

I believe that I am entitled to this relief or remedy, due to the fact that the appeal was wrongly dismissed based solely on Ms. Conroy's

motion (Agency's Attorney) to dismiss this case on July 24, 2007, because she stated she did not receive a copy of the brief filed by Mr. Feinstein, on my behalf.

THE FOLLOWING IS AN <u>ERRONEOUS</u> STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

7. ***"On October 31, 2007, Dr. Wadhwa's second claim, the alleged removal, was also dismissed for lack of jurisdiction because he once again failed to follow the AJ's Order and submit a non-frivolous claim for Board jurisdiction.***

THE FACTS ARE AS FOLLOWS:

The administrative judge issued a September 21, 2007 show-cause order notifying me that the Board might lack jurisdiction over my appeal. Accordingly, I was ordered "...to file evidence and argument to prove that this action is within the Board's jurisdiction."

On October 5, 2007, I submitted my brief in support of jurisdiction for appeal to the Board.

In the brief I stated that the issue at hand is a reduction-in-force (RIF) taken without RIF procedures, by the agency's "staff adjustment"

action of separating me from a full-time permanent clinical position in Primary Care and demoting me to a full-time temporary and then later to a full-time permanent nonclinical position in the Compensation & Pension (C&P) section (based on critical need), with a reduction in pay (annual salary).

In this appeal, I asserted that the agency failed to follow Title 38 rules when it conducted the "staff adjustment" and separated me from my full-time physician clinical position in Primary Care.

I contend that Title 38 employees are entitled to RIF procedures and the agency has failed to afford me those procedures when separating me from my full-time permanent physician position in Primary Care, pursuant to its "staff adjustment."

In determining whether I have made a nonfrivolous allegation of jurisdiction entitling me to a hearing, an administrative judge (AJ) may consider an agency's documentary submissions. See Dumas, 789 F.2d at 894; Manning, 742 F.2d at 1428; see also Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed. Cir. 1986) (Newman, J., additional views). But, to the extent that the agency's evidence constitutes mere factual contradiction of my otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting

assertions of the parties and the agency's evidence may not be dispositive. See Dumas, 789 F.2d at 893-94; see also Ferdon v. U.S. Postal Service, 60 M.S.P.R. 325, 329 (1994). Here, the AJ did not consider the evidence I submitted and decided based on the evidence submitted by the agency.

1. Has the petitioner ever had another case in this Court, a United States District Court, or in the Equal Employment Opportunity Commission?

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

8. *"In addition to this case, the petitioner has another case pending before the Board (PH-1221-08-0019-W-1). In it, the petitioner raises an alleged reprisal for whistleblowing claim against the DVA. An initial decision was rendered on June 26, 2008, that denied Dr. Wadhwa's request for corrective action."*

THE FACTS ARE AS FOLLOWS:

On July 23, 2006, I contacted the VA IG's (IG) Office to report the unsafe working conditions in the Outpatient Primary Care Clinics at PVAMC after I had encountered a life-threatening patient incident. Three days

later, in retaliation for whistleblowing, Dr. Murphy proposed a major disciplinary action against me of a fourteen-day suspension, under pretext of an alleged *Privacy Act* violation. This major disciplinary action was upgraded to a proposed removal from my employment by Dr. Grippi, within eight days after IG's Office contacted him regarding this incident.

The scope of the MSPB Hearing held on May 29, 2008 was very narrow. The issue addressed at this MSPB Hearing was: Did Philadelphia VA Medical Center (PVAMC) Officials retaliate against me for my "Whistleblower" disclosures to the Inspector General on July 23, 2006 when I returned to PVAMC from Northern Indiana VA Medical Center and I was assigned to the Compensation and Pension Unit instead of Primary Care?

The AJ's decision to deny corrective action was based on untruthful and unsubstantiated statements by my supervisors, Dr. Murphy and Dr. Grippi. I am in the process of requesting a petition for review of AJ's decision from the Board.

THE FOLLOWING IS AN <u>ERRONEOUS</u> STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

9. *"In addition, Dr. Wadhwa identifies several cases in his brief that he has had with the Equal Employment Opportunity Commision...The Petitioner also has a case in the U.S. District Court for the Eastern District of Pennsylvania..."*

THE FACTS ARE AS FOLLOWS:

Yes. I have cases in the U.S. District Court and in the Equal Employment Opportunity Commission. I filed my first EEO Complaint on December 20, 2004 and I have not received a hearing for my EEO complaints. The lengthy EEO process has led to my multiple requests for discriminatory retaliatory harassment related EEO counseling requests since December 2004 against Michael Grippi, M.D., Chief of Medicine, John Murphy, M.D., Director of Primary Care and Kathleen Craige, R.N., Nurse Manager at PVAMC.

Also, the lengthy EEO process has provided Dr. Murphy, Dr. Grippi and Ms. Craige, with several opportunities to continue their multiple unsuccessful attempts to fabricate charges of professional misconduct against me which resulted in my filing of the multiple EEO complaints. Also, these three individuals with the aid of Margaret O'Shea-Caplan, Associate Director at PVAMC, have subjected me to continued ongoing harassment in the workplace

(including denial of bereavement time to me at the time of death of my father).

On June 26, 2007, I endured utter humiliation when I was read my Miranda Rights in the VA Police Holding Room for common criminals at PVAMC and I was advised that I was under criminal investigation for alleged theft of government property, an act of retaliation for my whistleblower (On July 23, 2006, I reported to the VA IG's Office of the unsafe working conditions in the Outpatient Primary Care Clinics at PVAMC) and my previous and ongoing EEO activities against the agency officials at PVAMC. On July 3, 2007, I filed a Civil Action Lawsuit 07-2750, at the U.S. District Court for the Eastern District of Pennsylvania, regarding this humiliating incident.

On February 29, 2008, I was subjected to a humiliating and horrifying experience, when the Agency Officials at PVAMC staged an incident in an attempt to arrest me for false charges of alleged Battery, alleged Assault, and alleged Disorderly Conduct by me (Dr. Wadhwa). The Agency staged this incident in retaliation for my filing of Bivens Action (False Arrest) Civil Action No. 07-2750 on July 3, 2007, at the United States District Court for the Eastern District of Pennsylvania.

On June 27, 2008, as I was leaving the medical center at the end of my workday I was subjected to unreasonable "search and seizure of my personal information in a clear plastic Acme bag" by a VA Police Officer. The Agency Officials staged this incident in an attempt to arrest me for false charges of alleged removal of patient information from the medical center. The Agency staged this incident in retaliation for my whistleblowing and my previous and ongoing EEO activity, and for my filing of Bivens Action (False Arrest) Civil Action No. 07-2750, filed on July 3, 2007, at the United States District Court for the Eastern District of Pennsylvania.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

10. ***As of June 20, 2008, the District Court granted the DVA's motion to dismiss all claims with the exception of "Bivens Action"***

THE FACTS ARE AS FOLLOWS:

a. Civil Action No. 07-2677, Filed in the U.S. District Court on June 27, 2007 was for Final Agency Decision Agency Case No. 200J-0610-2007101312, Filed on March 16, 2007 for the Directed Reassignment Order for my return to

PVAMC from the VA in Northern Indiana. William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management ordered my return from NIHCS to PVAMC.

This case was dismissed by the Administrative Judge (AJ - USDC) based on misleading and misinformation provided to her by Agency's Counsel. *In the foot note on page 2 of AJ's Order dated June 20, 2008 it states that Agency Case No. 200J-0610-2007101312, Filed on March 16, 2007 is pending MSPB Administrative Hearing.*

On June 26, 2008, the Administrative Judge (AJ-MSPB) on the MSPB Administrative Hearing issued her decision as follows:

"The agency has proven by clear and convincing evidence that the decision to reassign the appellant to the C&P Section would have been made absent any disclosures about safety issues. The appellant's request for corrective action must be DENIED."

b. Civil Action No. 07-3301, Filed in the U.S. District Court on August 10, 2007 was for Agency Case No. 2003-0642-2007102108, Filed on May 7, 2007. This case was dismissed by the Administrative Judge (AJ -USDC) based on misleading and misinformation provided to her by Agency's Counsel.

The Agency's Counsel present this case as an isolated incident and does not rise to the level of discriminatory harassment by the Agency Officials, Dr. John Murphy, Director of Primary Care and Dr. Michael Grippi, Chief of Medicine at the Philadelphia VA Medical Center (PVAMC). But this is not the case.

The Agency did not conduct an investigation of my complaints on serious charges of *patient abuse* in Agency Case No. 2003-0642-2007102108, Filed on May 7, 2007. These complaints were remanded to the Agency by EEOC to provide me with precomplaint counseling, which the Agency did. The Agency did not conduct an investigation for these remanded complaints. Instead, the Agency issued a Final Agency Decision for very serious charges of *patient abuse* made against me by my two immediate supervisors, Dr. Murphy and by Dr. Grippi.

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

11. ***"Dr. Wadhwa, also failed to mention a case he has in the U.S. District Court for the District of New Jersey...In this case, Dr. Wadhwa alleges that the DVA violated the Freedom of Information Act."***

THE FACTS ARE AS FOLLOWS:

On July 26, 2006, I asked Dr. Murphy for the patient document that is discussed in his proposed disciplinary action for a fourteen day suspension.

Dr. Murphy replied to me, "I have not seen this patient document. This document never came to me, it went to HR (Human Resources). I have not reviewed this patient document." Dr. Murphy has proposed a disciplinary against me for a fourteen day suspension for violation of the Privacy Act without seeing this patient document.

Shortly thereafter, on the same day, Dr. Michael Grippi, Chief of Medicine, stated to me, "I will not meet with you, Dom, and to be quite frank, you have brought this upon yourself at the local level and at the VISN level. I will not meet with you alone." This statement alone compels a conclusion that Dr. Grippi has already prejudged me regarding the *Privacy Act* issue. I had no realistic expectation that either Dr. Murphy or Dr. Grippi will conduct a balanced and objective review regarding the *Privacy Act* issue and the proposed disciplinary action for a fourteen day suspension.

Therefore, On July 31, 2006, I made a formal request for these documents from the Chief of Staff at PVAMC, under the Freedom of

Information Act, 552a. 552, in conjunction with the Privacy Act, 5 U.S.C. as amended, 5 U.S.C. 552a. I did not receive this information from the Chief of Staff. On August 5, 2006, my attorney requested this information from the Privacy/FOIA at PVAMC and did not receive this information.

On September 18, 2006, my attorney filed Civil Action No. 06-4362 in the United States District Court of New Jersey on my behalf. The decision for this suit is pending.

2. Did the MSPB incorrectly decide or fail to take into account any facts?

THE FOLLOWING IS AN ERRONEOUS STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

12. *Dr. Wadhwa contends that the AJ failed to consider that he was "involuntarily assigned" and "separated" from his position."*

THE FACTS ARE AS FOLLOWS:

I assert that I was *erroneously* denied a hearing for the two MSPB cases by the Board.

I was simply separated from my over twenty-one (21) year tenured full-time position by only an e-mail notice of separation on September 12,

2007 from Dr. Murphy, my immediate supervisor. I was then demoted to a permanent nonclinical position in the C&P section via this same e-mail. This sequence of notice of separation of me from Primary Care and my demotion to the C&P section, both via e-mail, avoids the employment contract, avoids RIF procedures and safeguards, and avoids appeal rights.

Dr. Murphy, and Dr. Grippi have conducted a reduction-in-force, and, as agency officials, did not follow the requisite RIF procedures. See 5 U.S.C. §§3501-3504; 5 C.F.R. Part 351 (agencies must follow the Office of Personnel Management regulations when conducting reductions in force).

The agency's failure to apply the RIF regulations to the restructuring that led to the elimination of my position in Primary Care was an impermissible circumvention of the RIF regulations and a violation of my substantive and procedural rights.

3. <u>Did the MSPB apply the wrong law?</u>

THE FOLLOWING IS A STATEMENT IN THE RESPONDENT'S STATEMENT OF FACTS AND THE COURSE PROCEEDINGS, STATED IN QUOTATIONS, BELOW:

13. ***The administrative judge applied the correct law in determining that the Board lacked jurisdiction over Dr. Wadhwa'a appeal.***

PETITIONER'S RESPONSE TO THIS STATEMENT IS:

In James v. Von Zemenszky, 284 F.3d 1310, 1319-21 (Fed. Cir. 2002), the court held that the Department of Veterans Affairs (DVA) must use Title 5 RIF procedures when conducting a "staff adjustment" involving medical professionals appointed under 38 U.S.C. § 7401(1). In Isabella v. Department of State, 102 M.S.P.R. 259, (2006), the Board stated that the Von Zemenszky court found that "title 5 reduction-in-force provisions applied to Veterans Health Administration (VHA) health-care professionals."

Thus, in my situation, Dr. Murphy's and Dr. Grippi's offer to me of an assignment to a temporary position that was later converted to a permanent position in the C&P section as a "staff adjustment" in lieu of a RIF separation from a full-time position in Primary Care, would be an appealable RIF action.

Petitioner's Opposes the following in Respondent's Standard Review

1. *"The burden rests on the employee to prove, by a preponderance of the evidence, that the Board has jurisdiction over his (Dr. Wadhwa's)*

appeal. Dr. Wadhwa has failed to meet this burden, and thus the Board properly dismissed his claims for lack of jurisdiction."

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S STANDARD REVIEW, STATED IN QUOTATIONS, ABOVE:

In determining whether I have made a nonfrivolous allegation of jurisdiction entitling me to a hearing, an administrative judge may consider an agency's documentary submissions. See Dumas, 789 F.2d at 894; Manning, 742 F.2d at 1428; see also Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed. Cir. 1986) (Newman, J., additional views).

But, to the extent that the agency's evidence constitutes mere factual contradiction of my otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. See Dumas,

789 F.2d at 893-94; see also Ferdon v. U.S. Postal Service, 60 M.S.P.R. 325, 329 (1994).

Here, the AJ did not consider the evidence I submitted and decided based on the evidence submitted by the agency.

2. *"Dr. Wadhwa failed to allege facts establishing the Board's jurisdiction over his appeal."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S STANDARD REVIEW, STATED IN QUOTATIONS, ABOVE:

Please see my response to this statement in Response 1 above in Respondent's Standard Review.

Petitioner's Opposes the following in Respondent's Argument

Respondent stated:

1. *"In James v. Von Zemenszky, this court held that RIF regulations apply to Veterans Administration health care professionals appointed under Title 38 who are separated by a staff adjustment...Dr. Wadhwa fails to meet any of these exceptions."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

Dr. Murphy, and Dr. Grippi have conducted a reduction-in-force, and, as agency officials, did not follow the requisite RIF procedures.

See 5 U.S.C. §§3501-3504; 5 C.F.R. Part 351 (agencies must follow the Office of Personnel Management regulations when conducting reductions in force).

The agency's failure to apply the RIF regulations to the restructuring that led to the elimination of my position in Primary Care was an impermissible circumvention of the RIF regulations and a violation of my substantive and procedural rights.

2. *"Dr. Wadhwa attempts to argue he was "demoted" by a RIF action to establish Board jurisdiction, he fails to attach any legal meaning to the term if any of his allegations. (A demotion for purposes of RIF is defined as: a change of an employee while serving continuously within the same agency...to a position with a lower rate of pay...)"*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

Please see my response to this statement in Response 1 above in Respondent's Argument. I am an employee at PVAMC (same agency) and while serving continuously I was demoted from a clinical position to a nonclinical position with $2,257 drop in my annual salary. I was informed by Dr. Murphy and Dr. Grippi that my involuntary assignment to the C&P Section was a 'critical need' identified by the Agency. Thus, a demotion for purposes of RIF action.

3. *"Dr. Wadhwa did not suffer loss of pay or grade in is reassignment."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

VHA Handbook 5007/21 page IX -19 states: Preservation of Pay.

"The amount of annual pay (base plus market) paid to a physician as a result of the January 8, 2006, conversion may not be less than the amount of pay (base plus special pay and GAP, if applicable) paid to the individual on the day before the conversion (plus any increases to base pay or mandatory adjustments to special pay effective on January 8, 2006) for as long as an individual remains in the same assignment."

In my case, my special pay (market pay) of $60,257 at the Philadelphia VA Medical Center in October 2006 was reduced to $ 52,960 in January 2007.

I have suffered a loss of pay. My annual salary was reduced by $2,257.

4. *"Dr. Wadhwa was transferred from one full-time physician position to another full-time physician position with the same grade."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

In January 2007, I was issued a Directed Re-assignment order to return to the Staff Physician at PVAMC from Staff Physician at NICHS. But Dr. Murphy and Dr. Grippi convinced a ten member panel PVAMC to disregard the Directed Reassignment order as a transfer from William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management, and enroll me as *new hire* and demote me and reduce my salary at the same time.

5. *"Dr. Wadhwa alleges he suffered a loss of grade because the DVA 'separated' him from his clinical physician duties and reassigned him to non-clinical physician duties. However, this is not a separation or a loss of grade accounting to*

RIF regulations. The fact that Dr. Wadhwa deems his new physician duties less desirable does not grant his legal right to appeal to the Board."

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

At the time of my assignment to the C&P section in January 2007, Dr. Murphy and Dr. Grippi stated to me that there was a *critical need* in the C&P section at PVAMC. The agency identified this staffing need in the C&P section to meet the Medical Center Director's performance measure of timeliness for completion of C&P examinations. Thus, the agency was realigning its resources to more appropriately support the mission, vision, goals, and objectives (i.e., a staff adjustment).

This separation from my clinical position and assignment to a nonclincal position by Dr. Murphy and by Dr. Grippi was initially a staffing adjustment based on the critical need of the medical center. My permanent assignment to the C&P section by these agency officials was a permanent separation from my clinical duties and a permanent assignment to clerical duties.

6. *"Dr. Wadhwa did not suffer loss of grade in is reassignment and therefore was not demoted."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

I have suffered a loss in my annual salary by $2,257. My annual market pay was reduced by $2,257. I was offered no explanation for reduction in my salary by Dr. Murphy and Dr. Grippi.

7. *"While Dr. Wadhwa contends he suffered loss of pay in the form of a $5000 performance award and $2,257 loss if locality pay, these arguments are invalid."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

I was denied $5000 performance award by Dr. Murphy and Dr. Grippi that all of my colleagues received. They did not offer me an explanation for denying me performance pay. Locality pay was reduced by $2,257. Dr. Murphy and Dr. Grippi did not offer me an explanation for drop in my locality pay.

8. *"Rather, Dr. Wadhwa was reassigned "changed from one position to another without promotion or demotion. The Board has no jurisdiction to review assignment cases which do not involve loss of pay or grade, either*

voluntarily or involuntarily...Therefore, the Board properly dismissed Dr. Wadhwa's appeal for lack of jurisdiction.
(Even if Dr. Wadhwa had properly alleged an "involuntary reassignment" claim, the Board would still lack jurisdiction because Dr. Wadhwa did not suffer a loss of pay or grade.)"

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

I was demoted with reduction in pay, not reassigned as stated by the respondent.

4. <u>Petitioner's Opposes the following in Respondent's Statement –Did the MSPB fail to consider important grounds for relief?</u>

PETITIONER'S RESPONSE TO THE ABOVE STATEMENT IN RESPONDENT'S ARGUMENT SECTION:

9. Yes. The Board failed to consider important grounds for relief.

5. <u>Petitioner's Opposes the following in Respondent's Statement – Are there other reasons why MSPB's decision was wrong?</u>

10. *"Dr. Wadhwa alleges that the AJ prematurely closed the record. However, the AJ issued an Order dated April 26, 2007 directing Dr. Wadhwa to file evidence establishing Board jurisdiction within seven days. When Dr. Wadhwa failed to do so, the record closed."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

On April 18, 2007, the Administrative Judge (AJ) issued an order for my (Dr. Wadhwa's) first appeal (reduction in market pay issue) to hold a telephonic conference at 1:00 pm on April 27, 2007 to discuss the Jurisdictional issue. I had a patient scheduled for C&P evaluation at 1:00 pm and my supervisors, Dr. Murphy and Dr. Grippi would not allow me to reschedule this patient for a C&P evaluation at a later date. Therefore, I notified the AJ that I would not be able to attend the telephonic conference at the same time as a C&P evaluation of a patient. Therefore, the AJ closed the record on April 26, 2007 due to the telephonic conference scheduling conflict issue (not a jurisdictional issue, as is stated).

On April 27, 2007, I was denied the opportunity by the Agency's attorney to participate in a telephonic status conference with the AJ, during which the issue of jurisdiction was discussed. A three way telephonic conference was held at 12 noon on April 27, 2007 between the AJ, Stacey Conroy, Agency's Counsel, and my Attorney. The Agency's attorney, Stacey Conroy, mislead the AJ in believing that no more than three individuals can participate in the telephonic conference. Thus, Ms. Conroy excluded me from participation in this discussion.

11. *"The AJ did not 'ignore the Appellant's response dated May 1, 2007 or October 5, 2007," which alleged the Von Zemenszky decision confers Board jurisdiction over Dr. Wadhwa's 'adverse action' claims. The AJ addressed Von Zemenszky and explained why it does not apply to Dr. Wadhwa."*

PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED IN QUOTATIONS, ABOVE:

The AJ did not consider the evidence I submitted and decided based on the evidence submitted by the agency.

6. What relief do you want the court to take in this case?

12. PETITIONER'S RESPONSE TO STATEMENT IN RESPONDENT'S ARGUMENT, STATED ABOVE:

The Court should DENY the decision of the MSPB and GRANT the Petitioner relief as stated below

a) Admission of wrongdoing by Agency Officials at the Philadelphia VA Medical Center (PVAMC); formation of a Five-Member Physician Committee at PVAMC, with the petitioner, Dr. Wadhwa, as the Chairman of this Committee, in order to provide ongoing recommendations to the Agency to prevent a similar occurrence as that of the petitioner, Dr. Wadhwa, from happening at PVAMC in the future;

b) Issuance by the Court of a mandatory injunction prohibiting the Agency Officials from the relentless harassment at the workplace of the petitioner, Dr. Wadhwa, for exercising his civil rights.

c) Dismissal of Margaret O'Shea-Caplan, Associate Director for aiding Dr. Murphy's and Dr. Grippi's in ther retaliatory discriminatory prohibited personnel practice against me.

d) Dismissal of Dr. Murphy and Dr. Grippi from the Department of Veterans Affairs for their lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

e) Reporting of Dr. Murphy and Dr. Grippi to the Medical Licensing Board and the Physicians' National Data Bank for their lack of integrity, violation of VA standards of ethical conduct, conduct policies, performance expectations and prohibited personnel practices;

f) Dismissal of Kathleen Craige, R.N., Primary Care Nurse Manager, from the Department of Veterans Affairs for aiding Dr. Murphy and Dr. Grippi in engaging in prohibited personnel practices;

g) All elements of damages allowable by law and any other applicable entitlements, including punitive damages (in an amount to be determined by the Board to deter the Agency Officials at PVAMC from similar misconduct in the future), compensatory damages and consequential damages and reasonable attorney fees.

Conclusion:

For the reasons stated above, Petitioner respectfully requests from this Court that Oral Arguments be heard on the Respondent's (Merit Systems Protection Board - "MSPB" or "Board") Informal Brief and the Petitioner's Motion Opposing Respondent's Brief for the two above-captioned cases.

Respectfully submitted,

sd/
Dom Wadhwa, M.D., *Petitioner (pro se)*

Dated: July 12, 2008

Home Address of Petitioner

Dom Wadhwa, M.D.
215 E Camden Avenue, H-13
Moorestown, NJ 08057
Telephone: (609) 220-2771

Exhibit E

Petitioner's Notification of Personnel Action (SF-50)

Dated October 15, 2006
At PVAMC
Section 12 D. shows
$60,257

Please note: Petitioner was gone from PVAMC to NIHCS for three workdays only and his salary was reduced by $ 2,257.

App. 59

REQUEST FOR PERSONNEL ACTION
(Standard Form 50 – SF- 50)

PART A- Requesting Office

1. Action Requested	2. Request Number
(Blank)	(Blank)
3. Additional Information Call	4. Proposed Effective Date
(Blank)	(Blank)
5. Action Requested By	6. Action Authorized By
(Blank)	(Blank)

PART B- For Preparation of SF 50

1. Name	2. Social Security Number	3. Date of Birth	4. Effective Date
WADHWA, Dom	**xxx-xx-xxxx**	**10-26-48**	**1/21/07**

FIRST ACTION		SECOND ACTION	
5-A Code	5-B Nature of Action	6-A Code	6-B Nature of Action
721	**Reassignment**		
5-C Code	5-D Legal Authority	6-C Code	6-D Legal Authority
Z85	**38 USC CH 74**		
5-E Code	5-F Legal Authority	6-E Code	6-E Legal Authority

7. FROM: Position Title and Number			7. TO: Position Title and Number		
Physician			**Physician**		
8. Pay Plan	9.Occ.Code	10.Level	16. Pay Plan	17.Occ.Code	18.Level
VM	**602**	**15**	**VM**	**602**	**15**
11.Step	12. Total Salary	13. Pay Rate	19.Step	20.Total Salary	21. Pay Rate
10	XXXXXX	**PA**		XXXXXX	**PA**
12 A. Base Pay	12B. Locality Adj.		20A. Base Pay	20B. Locality Adj.	
xxxxxx	Ø		xxxxxx	(blank)	
12C. Adj. Base Pay	12D. Other Pay		20C. Adj. Base Pay	20D. Other Pay	
xxxxxx	**60,257***		xxxxxx	**58,000**	

14. Name and Location	22. Name and Location
VA HCS	**VA HCS**
Philadelphia, PA	**(Marion, Indiana)**
	PM & RS

***Please note 12 D. Other Pay was 60,257 before for being away for only three workdays from PVAMC.**

Exhibit E (Continued)

Petitioner's Notification of Personnel Action (SF-50)

Dated January 21, 2007
At PVAMC
Section 20 D. shows
$58,000

Please note: Petitioner was gone from PVAMC to NIHCS for three workdays only and his salary was reduced by $ 2,257.

App. 61

REQUEST FOR PERSONNEL ACTION
(Standard Form 50 – SF- 50)

PART A- Requesting Office

1. Action Requested	2. Request Number
Reassignment	**PCCM-07-642**
3. Additional Information Call	4. Proposed Effective Date
Judy Simmons x 5847	**Jan 21, 2007**
5. Action Requested By	6. Action Authorized By
Carol Patterson 1/22/07	**Michael A. Grippi, MD**
Vice President, Medicine Service	ACOS, Medicine Service

PART B- For Preparation of SF 50

1. Name	2. Social Security Number	3. Date of Birth	4. Effective Date
WADHWA, Dom	**xxx-xx-xxxx**	**10-26-48**	**1/21/07**

FIRST ACTION		SECOND ACTION	
5-A Code	5-B Nature of Action	6-A Code	6-B Nature of Action
721	**Reassignment**		
5-C Code	5-D Legal Authority	6-C Code	6-D Legal Authority
Z85	**38 USC CH 74**		
5-E Code	5-F Legal Authority	6-E Code	6-E Legal Authority

7. FROM: Position Title and Number	7. TO: Position Title and Number
Staff Physician (1.0 FTEE)	**Staff Physician (1.0 FTEE)**
	Table 1 Tier 1 Comp and Pension
8. Pay Plan 9.Occ.Code 10.Level	16. Pay Plan17.Occ.Code 18.Level
VM 0602 Phys	**VM 0602 Phys**
11.Step 12. Total Salary 13. Pay Rate	19.Step 20.Total Salary 21. Pay Rate
XXXXXX **PA**	XXXXXX **PA**
12 A. Base Pay 12B. Locality Adj.	20A. Base Pay 20B. Locality Adj.
xxxxxx Ø	xxxxxx (blank)
12C. Adj. Base Pay 12D. Other Pay	20C. Adj. Base Pay 20D. Other Pay
xxxxxx **58,000**	xxxxxx **58,000***

14. Name and Location	22. Name and Location
VA Medical Center	**Philadelphia VA Med. Ctr**
Marion, Indiana	**Medical Service**
	General Medicine T&L 94

***Please note 20 D. Other Pay (dropped from 60,257 to 58,000) for being away for only three workdays from PVAMC.**

Exhibit F

Denial * of Performance Pay of $5,000 (VA Form 10-0432) to Petitioner by

John Murphy, M.D. &
Michael Grippi, M.D.,
(Petitioner's Supervisors)

***Petitioner was offered no explanation whatsoever for his denial of Performance Pay.**

App. 63

VA PERFORMANCE PAY RECOMMENDATION & APPROVAL

Period Covered: 7/1/06 to 9/30/06
SERVICE/LOCATION: Medicine - Primary Care
SOCIAL SECURITY NO. XXX-XX-XXXX
PAY TABLE 1 PAY TIER 1
Wadhwa, Dom
ANNUAL PAY MAXIMUM TARGET PERFORMANCE PAY % OF ANNUAL PAY **$5,000**
PERFORMANCE GOAL AND OBJECTIVES
1. Compliance with EPRP Measures-for each and all measures which are not in compliance as of 6/30/06, the gap to full compliance will be reduced by > 50% by 9/30/06.
2. Discharge Summary Completion (as applicable) - All inpatient discharge summary responsibilities be completed 100% of the time within the timeline prescribed in hospital policy.
3. Clinic Cancellations - No clinics will be cancelled without the required 6 week notification (excluding emergencies).
4. Committee Participation - Provider will participate on at least one formal or informal committee with active participation recorded at least 90% of the time.
5. SUPERVISORY OFFIAL (Print name and title)
SIGNATURE (**blank**) DATE (blank)
John Murphy, MD. Director.
Primary Care
EMPLOYEE (Print Name and title)
SIGNATURE (blank) DATE (blank)
Dom Wadhwa, M D. Staff Physician
RECOMMENDED PERFORMANCE PAY % OF ANNUAL PAY **Ø (zero) Percent of Annual Pay**
DESCRIBE THE DEGREE TO WHICH GOALS AND OBJECTIVES WERE MET: Met none of the three goals

RECOMMENDING OFFICIAL (Print name and title)
SIGNATURE (**signed**) DATE **11/6/06**
Michael A. Grippi, MD. ACOS/Medicine
APPROVED AMOUNT {If different than recommended amount) **(blank)**
APPROVING OFFICIAL (Print name and title)
SIGNATURE DATE **(blank)**
VA Form 10-0432

Exhibit G

Listing of Briefs

U.S. Court of Appeals for the Federal Circuit

Case Details

Briefs are not available for download

7/3/2008	Respondent's Informal Brief (w/appendix attached) . BY Merit Systems Protection Board (Respondent). SERVED BY Mail ON 7/3/2008. FILED ON 7/3/2008 . (NON-CONFIDENTIAL)
5/22/2008	Informal Brief of Petitioner (with Appendix) . BY Dom Wadhwa (Petitioner). SERVED BY Court ON 5/27/2008. FILED ON 5/22/2008 . (NON-CONFIDENTIAL)